CLERK'S COPY.

23527

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. ~~442~~ 213.

WILLIAM B. TYLER, PLAINTIFF IN ERROR,

vs.

THE JUDGES OF THE COURT OF REGISTRATION.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED FEBRUARY 27, 1900.

(17,656.)

23528

(17,656.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 542.

WILLIAM B. TYLER, PLAINTIFF IN ERROR,

vs.

THE JUDGES OF THE COURT OF REGISTRATION.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	1½	2
Bond on writ of error	2	2
Caption	3	3
Petition	5	3
Order to show cause	11	6
Sheriff's return	15	6
Answer	20	7
Annex X—Certified copies of papers from the files of the land registration office	23	9
Y—Rules of the court of registration	55	20
Z—Diagram (omitted in printing)	83	29
Rescript	89	29
Final decree	95	30
Clerk's certificate	97	30
Assignment of error	99	30
Reservation and report	103	31
Reporter's certificate	104	32
Opinion	105	32
Dissenting opinion	127	39
Citation and service	181	56
Clerk's certificate	183	57
Stipulation to omit diagrams in printing	186	58

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 1, 1900.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the justices of the supreme judicial court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court, before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between William B. Tyler, of Peabody, in the county of Essex, in the said Commonwealth, petitioner, and The Judges of the Court of Registration, established at the said Boston, respondents, upon a petition for a writ of prohibition, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said petitioner, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twelfth day of March next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twelfth day of February, in the year of our Lord one thousand nine hundred.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
OLIVER WENDELL HOLMES,
Chief Justice of the Supreme Judicial Court
of Massachusetts.

1½ COMMONWEALTH OF MASSACHUSETTS, } ss.:
Suffolk, }

And now here the judges of the supreme judicial court of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme judicial court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John Noble, clerk of said supreme judicial court within and for said county of Suffolk, have hereto set my hand and the seal of said court this twentieth day of February, A. D. one thousand nine hundred.

[SEAL.] JOHN NOBLE, *Clerk.*

2 (*Bond on Writ of Error.*) [STAMP.]

Know all men by these presents that we, William B. Tyler, of Peabody, in the county of Essex and Commonwealth of Massachusetts, as principal, and the Fidelity and Deposit Company of Maryland, incorporated under the laws of Maryland, as surety, are held and firmly bound unto Leonard A. Jones, of Boston, and Charles T. Davis, of Worcester, in the said Commonwealth, judges of the court of registration of the said Commonwealth, in the full and just sum of five hundred dollars, to be paid to the said Leonard A. Jones and Charles T. Davis, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents.

Sealed with our seals and dated this twelfth day of February, in the year of our Lord one thousand and nine hundred.

Whereas lately, at a sitting of the supreme judicial court of Massachusetts for the county of Suffolk upon a petition depending in said court between the said William B. Tyler, as petitioner, and the said Judges of the Court of Registration, as respondents, judgment was rendered against the said William B. Tyler, and the said William B. Tyler having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Judges of the Court of Registration citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, on the twelfth day of March next:

Now, the condition of the above obligation is such that if the said William B. Tyler shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then

the above obligation to be void; else to remain in full force and virtue.

WILLIAM B. TYLER. [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By HARRISON HUME, *Resident Vice-President.*

Attest: HENRY E. RUSSELL,
Resident Assistant Secretary.

[Seal of Corporation.]

Signed, sealed, and delivered in presence of—
WILLIAM I. NORTON.

Approved:
OLIVER WENDELL HOLMES,
Chief Justice of the Supreme Judicial Court.

A true copy of the bond taken by the chief justice at the time of signing the citation upon the writ of error named in said bond, which bond is on file in my office.

Attest: JOHN NOBLE,
Clerk of Supreme Judicial Court for County of Suffolk.

2½ The within bond is hereby approved on behalf of the defendants in error.

HOSEA M. KNOWLTON,
Attorney General,
By FRANKLIN T. HAMMOND,
Assistant Attorney General.

3 & 4 COMMONWEALTH OF MASSACHUSETTS, } *ss:*
Suffolk, }

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our supreme judicial court, holden at Boston, within and for our said county of Suffolk, from the first day of January, in the year of our Lord one thousand nine hundred, to the first day of January, A. D. 1901, it is thus contained, the following being the entire record of the case:

5 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County.

WILLIAM B. TYLER, Petitioner,
v.
THE JUDGES OF THE COURT OF REGISTRATION, Respondents.

Petition.

To the honorable the justices of the supreme judicial court:

The petition of William B. Tyler of Peabody in the county of Essex showeth as follows:

1. On the 22d of December, 1898, David E. Gould of Brookline

in the county of Norfolk and George H. Jones of Chelsea in the county of Suffolk filed with the recorder of the court of registration at Boston, established in pursuance of a certain act of the general court passed in the year 1898, and entitled "An act to provide for registering and confirming titles to land," a certain application, in the form for that purpose contained in the said act, to have certain land therein described brought under the operation and provisions of the said act, and to have their title therein registered and confirmed, alleging in their said application that they were the owners in fee-simple of the said land which was therein described as certain parcels of land situated partly in Chelsea, in the county of Suffolk, and partly in Everett, in the county of Middlesex, being a portion of the land known as the Carter farm and a portion of the land known as the Heard estate, and shown on a plan of portions of the Carter farm and Heard estate in Chelsea and Everett, Mass., by Joseph R. Carr, C. E., bearing date November 1, 1898, and filed with the said application, which parcels were separately described as therein further set out. And one of the said parcels of land was therein described as a certain parcel of land situated in said Everett (marked "section B" on said plan) bounded southerly by the northerly line of Chelsea street, westerly by land known as the Nichols farm, northerly by the proposed extension westerly of Webster avenue, and easterly by land now or formerly of Butman. And the said application contained the other matters and was signed and sworn in the manner specified in the said act in respect of applications for registration of title.

6

2. Such proceedings were afterwards had upon the said application in the said court of registration that, on the 5th of January, 1899, a certain examiner of title, who had been appointed by the judge of registration, as in the said act provided, and to whom the said application had been referred by the said court of registration, filed in the said court a report thereon, concluding with a certificate that in his opinion the said applicants had a good title, as alleged in their said application, and proper for registration.

3. Thereupon, on the said 5th of January, 1899, the said court of registration ordered the publication in the "Boston Daily Advertiser," a newspaper published at the said Boston, of a certain notice addressed to divers persons therein named and to all whom it might concern, reciting the said application and the said description of the said land, and citing them to appear at the court of registration to be held at the said Boston on the 30th of January, 1899, at ten o'clock in the forenoon, to show cause, if any they had, why the prayer of the said petition should not be granted; and stating that unless they appeared at the said court at the time and place aforesaid their default would be recorded, and the said petition would be taken as confessed, and they would be forever barred from contesting the said petition or any decree entered thereon, which notice, dated the 5th of January, 1899, and attested by the said recorder, was afterwards published by the said recorder in the said "Boston Daily Advertiser," on the 6th of January, 1899.

4. Your petitioner is seised for an estate in fee-simple in posses-

sion of a certain parcel of land situate in the said Everett, bounded towards the east by Francis street, and west by land formerly of Carter, and measuring 40 feet upon each of the said boundaries, and 120 feet in depth between them, and being part of certain land formerly of one Butman, and being the easterly boundary of part of the said parcel of land described in the said application and marked "section B" on the said plan, as hereinbefore mentioned.

7

5. Your petitioner claims that the boundary line between his said parcel of land and the said land on the westerly side thereof included in the said parcel of land so described in the said application, is not correctly shown on the said plan referred to in the said application, and filed therewith, and that the parcel of land marked "section B" on the said plan encroaches upon and includes part of the said land of your petitioner.

6. The said court of registration intends to proceed, at the time and place specified in the said notice, to determine all matters relating to the title of the said applicants to the said parcel of land described in the said application, and marked "section B" on the said plan, and, among other matters, to determine the extent and limits of the land comprised therein to which they may have a good title proper for registration, and the boundaries of such land, including the boundary between the same and the said land of your petitioner, and upon finding that they have such title thereto, to enter a decree of confirmation and registration, which, according to the provisions of the said act, shall bind such land and quiet the title thereto, subject only to the exceptions in the said act mentioned, and be conclusive upon and against all persons, including the Commonwealth, whether mentioned by name in the said application or notice, or included in the general description, "to all whom it may concern."

7. Your petitioner submits that the said court of registration has no jurisdiction to hear and determine the said matters, or any of them, or to enter any such decree of confirmation or registration by reason that the provisions of the said act purporting to make such decree conclusive upon and against persons having any interest in land so registered, although they may have no notice of any of the said proceedings for registration, would, if valid, have the effect of depriving such persons of their property without due process of law, and otherwise than by the law of the land. And that the said act purports to give judicial powers to the recorder and assistant recorders therein mentioned who are not judicial officers appointed and holding their offices as provided in the constitution of this Commonwealth in respect of judicial officers, and also to give them powers to deprive persons of their property in such registered land without due process of law, and otherwise than according to the law of the land. And that the operation of the said act in other respects and all other proceedings and dealings under it in respect of land so registered, depend for the effect thereby intended upon such conclusive effect of the said original decree of registration and the exercise of such powers by the recorder and assistant recorders.

And that the said act is therefore, and for other reasons, contrary as well to the Constitution of the United States as to the constitution of this Commonwealth.

8 Wherefore your petitioner prays a writ of prohibition to be directed to the judges of the said court of registration, to prohibit them from further proceeding in the registration of the said parcel of land described in the said application, and marked "section B" on the said plan, or in the determination of the boundary between the said parcel of land, or any part thereof, and the said land of your petitioner.

STOREY & THORNDIKE,
Counsel for the Petitioner.

Filed January 25, 1899.

9&10 This petition for writ of prohibition was entered in our said court on the twenty-fifth day of January, A. D. 1899, and it was thereupon ordered as follows, to wit:

11–14 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss.*:

Supreme Judicial Court.

On the foregoing petition it is ordered that the petitioner give notice to the said respondents to appear before the justices of this court, to be holden at Boston, within and for said county of Suffolk, on the second Tuesday of February next, by serving them with an attested copy of said petition and of this order thereon fourteen days, at least, before said second Tuesday of February next, that they may then and there show cause why the prayer of said petition should not be granted.

By the court:

JOHN NOBLE, *Clerk.*

January 26, 1899.

15&16 Upon which order is the following return of the officers serving the same, viz:

SUFFOLK, *ss.*:

BOSTON, *January 26th*, 1899.

I this day served the within petition and order of court thereon on the within-named respondents, Leonard A. Jones and Charles Thornton Davis, judges of the court of registration, by delivering to each in hand an attested copy thereof for their appearance at court as within directed.

FRED H. SEAVEY,
Deputy Sheriff.

Service & travel	1.08
Copies	3.00
	4.08

And afterwards said respondents appeared by the attorney general of the Commonwealth, and on the twenty- y of February, in said year, filed their answer as follows, to

Respondents' Answer.

now come the respondents Leonard A. Jones and Charles T. as they are, respectively, judge of registration and assistant f registration, duly appointed and qualified, of the court of ation, established by chapter 562 of the Acts of the General passed in the year 1898, known as "the land registration nd for answer to the petition in this case, say,—

They admit the allegations contained in paragraph 1 of said n; they file herewith, as a part of the case (see Annex X), a certified documents and plan from said court of registration, ng the proceedings on the application of said David E. Gould among which their application for registration is numbered), omitting the description of the property, except the section "section B;" the copy of the plan accompanying said appli- , drawn on a reduced scale, is numbered 3, and they say that diately after said application was filed, to wit, on December 98, the said court of registration entered an order referring pplication to Malcolm McLoud, Esq., a duly appointed exam- f titles, for examination and report, a copy of which order is bered 6.

They admit the allegations contained in paragraph 2 of said on; and they say that the said Malcolm McLoud, Esq., filed eport as therein alleged, after having searched the records and tigated all facts stated in said application or otherwise brought s notice, the copy of which report is numbered 7, and that on ary 5, 1899, on the filing of said report, notice thereof was by the recorder of said court to said applicants, as required w.

) They admit the allegations contained in paragraph 3 of said ion; and they further say that, in pursuance of said statute, on ary 7, 1899, said court by proper order caused a duly attested of the notice mentioned in said petition to be mailed by the rder to every person named therein whose address was known, and also, by proper order, caused a duly attested copy of said notice to be posted in a conspicuous place on each parcel of land included in said application, once on January 1899, and once again on January 16, 1899, by M. Frank Eastman, eputy sheriff for the county of Middlesex, and Fred H. Seavey, eputy sheriff for the county of Suffolk, who respectively duly le return of such service by posting as aforesaid; and the said rder duly filed before the return day a certificate of the service aid notice by publishing and mailing as directed by the court— as required by law; and the certified document numbered 8 tains a copy of said notice, of said order directing the service of l notice by publishing, mailing, and posting on the land, of the

recorder's certificate of service, and of the officers' returns of such service.

(4.) They admit the allegations contained in paragraph 4 of said petition, and annex hereto, marked "Exhibit 1," a plan showing the petitioner's parcel and the portion of said section B therein referred to, which said parcel was acquired by said petitioner by deed from Charles B. Farley, dated January 19, 1899, and recorded with Middlesex south district deeds on January 23, 1899, in Book 2713, page 521.

(5.) They admit that the petitioner claims, as alleged in paragraph 5 of said petition, that the boundary line between his said parcel of land and a portion of said section B is not correctly shown on the plan accompanying said application, and that the petitioner claims that said section B, as shown on said plan, encroaches upon and includes part of the said land of the petitioner, but they do not admit that such is the fact; and they say that the petitioner is entitled, under the provisions of St. 1898, c. 562, to appear and answer in the proceedings in said court and to have his claim as aforesaid judicially determined according to such provisions; but they say that the petitioner has not so appeared nor answered.

(6.) They deny the allegations contained in paragraph 6 of said petition, but they say that on January 30, 1899, the said court of registration allowed a motion by which the proceedings regarding the land designated as section B aforesaid were continued to April 3, 1899, at 10 o'clock a. m., to await the decision of this court in the present case, a copy of which motion is numbered 12 among said certified documents; and they furthermore say that, in pursuance of the authority conferred upon them to exercise the jurisdiction committed to the said court of registration by law, they do intend, unless restrained by a writ of prohibition from this court, at the time to which the said application for registration of said section B now pending in said court of registration has been or may be continued, and after the decision of this court in this case, to proceed to determine in accordance with the provisions of said St. 1898, c. 562, all matters relating to the said application, to register the title of said applicants to the said parcel of land, and to enter such decree in the premises as may be fit and proper.

(7.) They deny the allegations contained in paragraph 7 of said petition, and say that chapter 562 of the acts of the year of 1898 does not contravene the provisions either of the Constitution of the United States or of the constitution of this Commonwealth, for any of the reasons therein specified or for any other reasons, but that the said provisions are in accordance with both of said constitutions, and are valid and binding; that the respondents constituting the court of registration have jurisdiction to hear and determine all questions arising upon the application for the registration of the title to the parcel of land aforesaid, and also over such other questions as may come before such court under the said act.

(8.) They say that, in accordance with the provisions of St. 1898, c. 562, said court of registration has made certain rules of practice and procedure in said court, a copy of which rules is filed herewith

part of the case, and that said rules have been examined and ap-
ed by the justices of the supreme judicial court, and are now
ll effect and operation. (See Annex Y.)
.) And the respondents further say that the petition in this
se does not set forth any legal cause for granting the prayer
eof.

HOSEA M. KNOWLTON,
Attorney General.

iled February 25, 1899.

opy, including Annex X, and Annex Y, and Annex Z, being
h. 1.

& 24

ANNEX X.

MMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Court of Registration.

The documents and plan hereto annexed, omitting from the peti-
n Exhibits "A" and "B," except the description of section "B"
said Exhibit A, and Exhibit "A" from each of the notices filed
Middlesex, south district, and Suffolk registries, respectively, are
ue copies of the originals on file in the land registration office.
Attest, with the seal of said court:

[Seal Massachusetts Court of Registration.]

CLARENCE C. SMITH, *Recorder.*

No. 1.

OMMONWEALTH OF MASSACHUSETTS:

o the honorable the judge of the court of registration:

We, the undersigned, hereby apply to have the land hereinafter
escribed brought under the operation and provisions of the land
gistration act, and to have our title therein registered and con-
rmed. And we declare:

(1.) That we are the owners in fee-simple of a certain parcel of
nd, with the buildings thereon, situate in Chelsea, in the county
f Suffolk, and in Everett, in the county of Middlesex, both in the
ommonwealth of Massachusetts, and particularly described as set
rth in Exhibit A filed herewith.

The public and private ways shown on a plan filed herewith are
f the width and their lines are as laid down on said plan, and your
etitioners respectfully ask to have the lines of said ways determined
o be as laid down on said plan.

Said plan was drawn by Joseph R. Carr, C. E., dated Nov. 1, 1898.

Second. A certain parcel of land situated in said Everett (marked
section B" on said plan), bounded southerly by the northerly line
f Chelsea street; westerly by said land known as the "Nichols

farm;" northerly by said proposed extension westerly of Webster avenue, and easterly by land now or formerly of Butman.

26 (2.) That said land at the last assessment for taxation was assessed at $64,900 and the buildings at none; total assessment, $64,900.

(3.) That we do not know of any mortgage or encumbrance affecting said land, or that any other person has any estate or interest therein, legal or equitable, in possession, remainder, reversion or expectancy other than as follows:

The mortgage given by us, George H. Jones and David E. Gould, to Frank W. Reynolds and John D. Bryant, trustees under the will of Elizabeth M. Reynolds, late of Brookline, in the county of Norfolk and said Commonwealth, deceased, and trustees under the will of Margaret B. Carter, late of said Boston, deceased, for $90,000, dated November 26th, 1898, recorded with Suffolk deeds, Book 2569, page 596, and with Middlesex (south district) deeds, Book 2701, page 44.

(4.) That we obtained title by deed from Frank W. Reynolds and John D. Bryant, trustees as aforesaid, dated November 26th, 1898, and recorded in the registry of deeds for the county of Suffolk, Book 2569, page 593, and in the registry of deeds for the county of Middlesex (south district), Book 2701, page 41.

(5.) That said land is unoccupied.

(Name) ——. (Post-office address) ——. (Nature of occupancy) ——.

(6.) That the names in full and addresses so far as known to us of the occupants of all lands adjoining said land are as follows:

(Name) ——. (Post-office address) ——.

As shown on Exhibit B hereto annexed.

(7.) That the names in full and addresses so far as known to us of the owners of all lands adjoining said land are as follows:

(Names) ——. (Post-office address) ——.

27 As shown on Exhibit B hereto annexed.

(8.) That we are married to Lizzie E. Jones and Ada J. Gould, respectively.

(9.) That our full names, residences, and post-office address are as follows:

(Name.)	(Post-office address.)
George H. Jones,	465 Washington Ave., Chelsea, Mass.
David E. Gould,	Westbourne terrace, Brookline, Mass.

Dated this twelfth day of December, in the year eighteen hundred and ninety-eight.

DAVID E. GOULD.
GEORGE H. JONES.

COMMONWEALTH OF MASSACHUSETTS, *ss:*

DECEMBER 12TH, 1898.

Then personally appeared the above-named George H. Jones and David E. Gould, known to me to be the signer- of the foregoing

petition, and made oath that the statements made therein, so far as made of their own knowledge, are true, and so far as made upon information and belief that they believe them to be true.

Before me—

RODNEY LUND,
Justice of the Peace.

28 [Endorsed:] No. 21. David E. Gould *et al.*, petitioners. Petition for registration of land, dated December 12, 1898. We hereby assent to the granting of the within petition. ——, mortgagee. Frank W. Reynolds, John D. Bryant, trustees. For petitioner, D. E. Gould, *pro se.* For respondent, —— ——. Court of registration. Filed Dec. 22, 1898, 9 o'clock 10 min. a. m.

29 No. 2.

Schedule of Documents Filed with Petition.

Deed of Frank W. Reynolds & *al.*, trs., to Geo. H. Jones & *al.*, dated 26 Nov., 1898, & rec'd Suffolk deeds, 2569, 593.

Certified copy of mortgage, subject to which said petition is made, from Geo. H. Jones & *al.* to Frank W. Reynolds & *al.*, trs., dated Nov. 26, 1898, and recorded with Suffolk deeds, 2569, 596.

Certified copy of lease, subject to which said petition is made.

Plan of land described in petition made by Jos. R. Carr, d't'd Nov. 1, 1898.

30 [Endorsed:] No. 21. David E. Gould & *al.*, petitioners. Schedule of documents filed with petition. Court of registration. Filed Dec. 22, 1898, 9 o'clock 10 min. a. m.

(Here follows diagram marked p. 31. omitted in printing per stipulation.)

32&33 No. 4.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Court of Registration.

To all whom it may concern:

David E. Gould and George H. Jones, of Chelsea, in the county of Suffolk and Commonwealth aforesaid, hereby give notice that they have filed a petition in said court to have the title to certain land therein described registered and confirmed pursuant to the land registration act. Said land is situated in Chelsea and Everett, in the counties of Suffolk and Middlesex, in said Commonwealth, and bounded and described as follows:

(See Exhibit "A.")

Said petition was filed with the recorder, at Boston, in the county of Suffolk, on the 21st day of December, in the year eighteen hundred and ninety-eight.

Dated this 22nd day of December, in the year eighteen hundred and ninety-eight.

DAVID E. GOULD,
In Behalf of George H. Jones.

34 [Endorsed:] 53. Wanted. No. 21. D. E. Gould *et als.*, petitioners. Notice of filing petition, dated December 22, 1898. Middlesex reg. of deeds, so. dist. Dec. 24, 1899, 11 h. 10 m. a. m., recorded. P'd 1.25. Compared. Cambridge, Dec. 24, 1898. At 11 o'clock and 10 minutes a. m. received and entered with Middlesex so. dist. deeds, Book 2707, page 81. Attest: Edwin O. Childs, register.

35 No. 5.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Court of Registration.

To all whom it may concern:

David E. Gould and George H. Jones, of Chelsea, in the county of Suffolk and Commonwealth aforesaid, hereby give notice that they have filed a petition in said court to have the title to certain land therein described registered and confirmed pursuant to the land registration act. Said land is situated in Chelsea and Everett in the counties of Suffolk and Middlesex, in said Commonwealth and bounded and described as follows:

See Exhibit "A."

Said petition was filed with the recorder, at Boston, in the county of Suffolk, on the 21st day of December, in the year eighteen hundred and ninety-eight.

Dated this twenty-second day of December, in the year eighteen hundred and ninety-eight.

DAVID E. GOULD,
And in Behalf of Geo. H. Jones.

36 [Endorsed:] 245. 32705. No. 21. David E. Gould *et al.*, petitioners. Notice of filing petition, dated December 22, 1898. Suffolk registry of deeds. Dec. 23, 1898, received for record 10.55 a. m. 85c. Boston, December 23, 1898. At 10 o'clock and 55 minutes a. m. received and entered with Suffolk deeds, Liber 2577, page 245. Attest: Thos. F. Temple, register.

No. 6.

37 [SEAL.]

COMMONWEALTH OF MASSACHUSETTS, } *ss:*
Suffolk, }

Court of Registration.

To Malcolm McLoud, Esq.:

In the matter of the petition of David E. Gould *et al.*, dated December 12, 1898, and numbered 21 on the files of said court, you are hereby authorized and directed to search the records and investigate all facts stated in said petition or otherwise brought to your notice in reference to said petition, and to file in the case as soon as may be your report thereon, concluding with your opinion upon the title to the land therein described.

Dated this twenty-second day of December, in the year 1898.

By order of the court.

Attest: CLARENCE C. SMITH, *Recorder.*

To the honorable the judge of the court of registration:

In accordance with the foregoing order I have searched the records and investigated all the facts stated in the above-named petition, or otherwise brought to my notice, and herewith file my report thereon, concluding with my opinion upon the title.

Dated this fifth day of January, in the year 1899.

MALCOLM McLOUD, *Examiner.*

38 [Endorsed:] No. 21. David E. Gould *et al.*, petitioners. Reference to Malcolm McLoud, Esq., to examine title. Dated December 22, 1898. Court of registration. Filed Jan. 5, 1899, 10 o'clock 30 min. a. m.

39 No. 7.

Court of Registration.

Report.

To the honorable the judge of the court of registration:

In accordance with your order dated Dec. 22nd, 1898, in the matter of the petition of David E. Gould *et al.*, dated Dec. 12th, 1898, and numbered twenty-one on the files of said court, I have examined the title of the land situated in Chelsea and Everett, described in said petition and being the land shown on plan entitled "Portions of the Carter farm and Heard estate, in Chelsea and Everett, Mass., by Jos. R. Carr, C. E.," dated Nov. 1st, 1898, duly recorded with Suffolk and Middlesex deeds, and find the title of record to be good in David E. Gould and George H. Jones, subject to the mortgage given to Frank W. Reynolds and John D. Bryant, trustees, of which a certified copy is on file with said petition, and in my opinion said Gould and Jones are the sole owners in fee of the

premises described in said mortgage, subject only to said mortg
and to unpaid taxes of 1898.

Respectfully yours, MALCOLM McLOUI

Boston, January 5th, 1899.

Sheet No. 136, title No. 21.

40 [Endorsed:] No. —. —— ——, petitioner.

41 No. 8.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

Court of Registration.

To Howard C. Morse, William L. Farnsworth, Abbie A. Rog
Bray Wilkins, John H. Horan, Henry A. Emerson, trustee; W
liam R. Richards, E. B. Richards, Ada M. Davis, and Kate
Whitney, of Boston, in said county of Suffolk; Clarence S. Wh
ney, S. M. Cathcart, Angie L. Young, Lillian S. Chapel, Susa
Clark, Third Congregational Society, William S. Chipman, An
S. Chipman, James Gould, Robert Parkin, Charles C. Donn
Elizabeth C. Binns, Mary Uman, Ella F. Davis, Charles S. Ma
Mary W. Bliss, M. Eugene Rice, John H. Jones, John C. Lo
John H. Low, and William D. Baker, of Chelsea, in said county
Suffolk; Edward E. Greenwood, Elizabeth Chisholm, Delia Gow
Herbert A. Wells, L. C. Clifford, Jr., James R. Orr, Carol
Schenzenbecker, B. Schenzenbecker, William H. Peavey, Gr
Malson, Daniel McAdam, William M. Guptill, H. E. User, F.
Aldrich, Joseph Davies, T. E. Rockwell, A. D. Malloch, L.
Scott, L. N. Van Epps, F. O. Sargent, Ronella F. Francis, Je
miah Lynch, E. W. Pressey, Sarah M. Parnell, Elmira Buzz
Charles W. Richardson, Heirs of Elizabeth M. Blake, N. J. Me
Mary E. Perry, Charles W. Greenwood, Jennie M. Rhines, Ma
A. Stimpson, and the City of Everett, of Everett, in the county
Middlesex and said Commonwealth; Gustave Anderson and
ward A. Foster, of Somerville, in said county of Middlesex; Sa
H. Hastey, of Malden, in said county of Middlesex; Emma
Bowker, of Waltham, in said county of Middlesex, Arthur
Bowditch, of Brookline, in the county of Norfolk and said Co
monwealth; Elizabeth A. Richardson, of Wellesley, in said cou
of Norfolk; Charles B. Farley and Florence E. Blackett, of P
body, in the county of Essex and said Commonwealth; Elizab
S. Stimpson, of Silver Lake, in said Commonwealth, and Will
J. McNeil, of Petaluma, in the State of California, and to
whom it may concern:

Whereas a petition has been presented to said court by David
Gould, of said Brookline, and George H. Jones, of said Chelsea,
register and confirm their title in the following-described land:

Certain parcels of land situated partly in said Chelsea, and par

in said Everett, being a portion of the land known as the "Carter farm," and a portion of the land known as the "Heard estate," believed to be correctly shown on a plan of "Portions of the Carter farm and Heard estate in Chelsea and Everett, Mass.," by Jos. R Carr, C. E., bearing date November 1st, 1898, and duly recorded, bounded and described as follows:

First. A certain parcel of land situated in said Everett (marked "section A" on said plan), bounded southerly by the proposed extension westerly of Webster avenue, as shown on said plan, and by Union street, as shown on said plan; westerly by the "Nichols farm," so called; northerly by land now or formerly of Bliss, and easterly by land now or formerly of Butman.

Second. A certain parcel of land situated in said Everett (marked "section B" on said plan), bounded southerly by the northerly line of Chelsea street; westerly by said land known as the "Nichols farm;" northerly by said proposed extension westerly of Webster avenue, and easterly by land now or formerly of Butman

Third. A certain parcel of land situated in said Everett (marked "section C" on said plan), bounded southerly by the northerly line of Chelsea street; westerly by land now or formerly of Butman; northerly by said proposed extension westerly of Webster avenue, and easterly by the westerly line of Malden street.

Fourth. A certain parcel of land situated in said Everett (marked "section D" on said plan), bounded southerly by said proposed extension westerly of Webster avenue; westerly by land now or formerly of Butman; northerly by land now or formerly of said Butman; and easterly by the westerly line of Malden street.

Fifth. A certain parcel of land situated in said Everett (marked "section E" on said plan), bounded southerly by Webster avenue; westerly by the easterly line of Malden street; northerly by land now or formerly of McNeil, Hoyt, and others, and easterly by the county line between said Everett and Chelsea.

Sixth. A certain parcel of land situated partly in said Everett and partly in said Chelsea (marked "section F" on said plan), bounded southerly by the northerly line of the county road, so called; westerly by the easterly line of Malden street, in Everett; northerly by Reynolds avenue; easterly by a line parallel with and distant sixty feet westerly from the westerly line of Bassett street.

Seventh. A certain parcel of land situated partly in said Everett and partly in said Chelsea (marked "section G" on said plan), bounded southerly by Reynolds avenue; westerly by the easterly line of Malden street in said Everett; northerly by Webster avenue; easterly by Bassett street in said Chelsea to land heretofore conveyed to Whitney; southerly again by said land now or formerly of said Whitney, and easterly again by said land now or formerly of said Whitney, ninety-five feet, more or less, to said Reynolds avenue.

42 Eighth. A certain parcel of land situated in said Chelsea (marked "section H" on said plan), bounded westerly by Bassett street; northerly by Webster avenue; easterly by the west-

erly line of Washington avenue, and southerly by a line parallel with and distant ninety-five feet southerly from the southerly line of Webster avenue.

Ninth. A certain parcel of land situated in said Chelsea (marked "section K" on said plan), bounded southerly by Reynolds avenue; westerly by land now or formerly of the Third Congregational Church; northerly by a line parallel to and distant southerly ninety-five feet from the southerly line of Webster avenue, and easterly by the westerly line of Washington avenue.

Tenth. A certain parcel of land situated in said Chelsea (marked "section L" on said plan), bounded southwesterly by Bloomingdale street, there measuring seventy-four feet, more or less; westerly by Carter street; northerly by land now or formerly of Slade, there measuring sixty-four and $\frac{14}{100}$ feet, more or less; westerly again by said land of Slade; northeasterly by the curved southerly line of Washington avenue; southeasterly by land now or formerly of Hillbourn; southwesterly by land now or formerly of George H. Jones, there measuring ninety-eight feet, more or less, and southeasterly again by said land now or formerly of George H. Jones.

Eleventh. A certain parcel of land situated in said Chelsea (marked "section M" on said plan), bounded southwesterly by Orange street, now so called, formerly Auburn street; westerly by Carter street; northeasterly by land of owners unknown, and southeasterly by land of owners unknown. Containing by estimation 6,950 square feet, more or less, and being lot fifty-nine on a "plan of land in Chelsea belonging to the heirs of Joshua Carter, by John Low, October, 1853," which plan is recorded with Suffolk deeds, Plan Book 1, plan No. 30.

Twelfth. A triangular parcel of land situated in said Chelsea (marked "section N" on Carr's plan of November 1st, 1898, above referred to), being so much of lot numbered seven on the aforementioned plan by John Low as lies northeasterly of the northeasterly line of Auburn street, so called, on said Low's plan (now Orange street), prolonged northwesterly so as to run through said lot No. 7; said prolonged line being the northeasterly line of the proposed extension of said Orange street, as shown on said Carr's plan of November 1st, 1898.

Thirteenth. A certain parcel of land situated in said Chelsea (marked "section O" on said plan of November 1st, 1898, by J. R. Carr), bounded southerly by the curved northerly line of the proposed extension of Orange street as shown on said Carr's plan; westerly by land now or formerly of Low two hundred and thirty feet; northerly by the southerly line of the county road, so called, one hundred forty-seven feet, more or less, to land now or formerly of James Gould, and easterly by land now or formerly of James Gould.

Fourteenth. A certain parcel of land situated in said Chelsea and Everett (marked "section P" on said plan), bounded southerly by the northerly line of the proposed extension of Orange street, as shown on said Carr's plan; westerly by land now or formerly of Stimpson; northerly by the curved southerly line of the county road, and

easterly two hundred thirty feet by land now or formerly of Annie S. Chipman.

Also the fee and soil of the streets, roads and ways shown on said plan so far only as we own and have the right to convey the same, and so far only as the same or any of them adjoin the lands, or any of them, hereby conveyed, and subject to the use of such streets by the grantors and all claiming under them, and by any and all persons to whom any of the Carter farm or of the Heard estate has heretofore been sold or agreed to be sold, and by any and all persons for all purposes for which streets may be lawfully used in the cities of Chelsea and Everett.

You are hereby cited to appear at the court of registration, to be held at Boston, in said county of Suffolk, on the thirtieth day of January, A. D. 1899, at ten o'clock in the forenoon, to show cause, if any you have, why the prayer of said petition should not be granted. And unless you appear at said court at the time and place aforesaid your default will be recorded, and the said petition will be taken as confessed, and you will be forever barred from contesting said petition or any decree entered thereon.

Witness Leonard A. Jones, Esquire, judge of said court, this fifth day of January, in the year eighteen hundred and ninety-nine.

Attest with the seal of said court.

[SEAL.] CLARENCE C. SMITH, *Recorder.*

43 In the matter of said petition the recorder is hereby ordered to serve the foregoing citation by publishing the same forthwith in the Boston Daily Advertiser, a newspaper published in Boston, in the county of Suffolk and said Commonwealth, and by causing a duly attested copy thereof to be mailed, within seven days after such publication, to every person named in said citation whose address is known.

It is further ordered that a duly attested copy of said citation shall be posted by a sheriff or deputy sheriff in a conspicuous place on each parcel of land included in said petition fourteen days at least before the return day of said citation.

Dated this fifth day of January, in the year eighteen hundred and ninety-nine.

LEONARD A. JONES,
Judge of the Court of Registration.

Recorder's Certificate of Service.

I hereby certify that I have served the foregoing citation by publishing the same, as directed by the court, and by mailing a duly attested copy thereof to every person named in said citation whose address is known, in accordance with the foregoing order.

CLARENCE C. SMITH, *Recorder.*

44 [Endorsed:] No. 21. David E. Gould *et al.*, petitioners. Citation, orders, and returns, dated January 5, 1899; returnable January 30, 1899. 438.

SUFFOLK, *ss:*

CHELSEA, *January 11th*, 1899.

By virtue of the foregoing order, I posted in a conspicuous place on each parcel of land included in the foregoing citation lying within the county of Suffolk a duly attested copy of said citation fourteen days at least before the return day thereof, to wit, on the tenth day of January, eighteen hundred and ninety-nine.

FRED H. SEAVEY,
Deputy Sheriff.

Posting	6.00
Copies	6.00
Travel	40
	12.40

MIDDLESEX, *ss:*

JANUARY 17TH, 1899.

By virtue of the foregoing order, I posted in a conspicuous place on each parcel of land included in the foregoing citation lying within the county of Middlesex a duly attested copy of said citation fourteen days at least before the return day thereof, to wit, on the sixteenth day of January, eighteen hundred and ninety-nine.

M. FRANK EASTMAN,
Deputy Sheriff.

Fees.

Copies	2.00
Posting	2.00
Travel	48
Horse & c.	60
	$5.08

In serving this precept it was necessary and I actually used a horse and carriage 5 miles.

M. F. EASTMAN,
Deputy Sheriff.

45 No. 9.

[SEAL.]

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Court of Registration.

In the matter of the petition of David E. Gould *et al.*, numbered 21, the said petitioners having requested that the line of the public ways mentioned therein as boundaries of the land therein described be determined—

It is ordered that notice of said petition be given by the recorder by mailing a registered letter to the mayor of the cities in which such land lies, and, if any of the ways are highways, to one of the

county commissioners of the county or counties in which the land lies.

Dated this seventh day of January, in the year 1899.

LEONARD A. JONES,
Judge of the Court of Registration.

I hereby certify that on Monday, the tenth day of January, in the year 1899, I served the notice required by the foregoing order by mailing a registered letter stating said applicants' request and naming the ways mentioned to Seth J. Littlefield, mayor of Chelsea; Arthur E. Hatch, mayor of Everett; Levi S. Gould, chairman of Middlesex county commissioners, and David F. Barry, president of the board of aldermen of the city of Boston, as chairman of the county commissioners of Suffolk county.

CLARENCE C. SMITH, *Recorder.*

46 [Endorsed:] No. 21. David E. Gould *et al.*, petitioners. Notice to mayor, selectman, or county commissioner of petition, dated January 7th, 1899.

47 No. 10.

[SEAL.]

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Court of Registration.

In the matter of the petition of David E. Gould *et al.*, numbered 21, it is hereby ordered that the recorder send forthwith a registered letter to the chairman of the board of aldermen of Chelsea, in said county, acting as county commissioners in said city, enclosing copy of the notice issued in said case, with a notice that petitioners ask to have the lines of certain ways determined, as stated in their petition.

Dated this seventeenth day of January, in the year 1899.

LEONARD A. JONES,
Judge of the Court of Registration.

I hereby certify that on Tuesday, the seventeenth day of January, in the year 1899, I served the notice required by the foregoing order by mailing a registered letter stating said applicants' request and enclosing a certified copy of the notice issued in the case to the chairman of the board of aldermen of the city of Chelsea, acting as county commissioners in said city.

CLARENCE C. SMITH, *Recorder.*

48 [Endorsed:] No. 21. David E. Gould *et al.*, petitioners. Notice to chairman of board of aldermen of Chelsea, acting as county commissioners in said city, dated January 17, 1899.

49 No. 11.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

Court of Registration.

DAVID E. GOULD ET AL., Petitioners. No. 21.

And now come the petitioners and pray that they may be allowed to amend their petition by striking out their request to have the lines of the public ways shown on the plan filed with their petition adjudged and determined by the court to be as laid down on said plan, and further that they be allowed to strike out of their said petition the 12th described parcel of land, being sect. N on said plan.

DAVID E. GOULD.
GEORGE H. JONES.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

JANUARY 30, 1899.

Then personally appeared the above-named David E. Gould and George H. Jones, known to me to be the signers of the foregoing petition, and made oath that the statements made therein, so far as made of their own knowledge, are true, and so far as made upon information and belief that they believe them to be true.

Before me—

CLARENCE C. SMITH,
Justice of the Peace.

50 [Endorsed:] No. 21. David E. Gould *et al.*, petitioners. Motion for amendment. Motion allowed. Leonard A. Jones, judge. Court of registration. Filed Jan. 30, 1899, 10 o'clock 5 min. a. m.

51 No. 12.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

Court of Registration.

DAVID E. GOULD ET AL., Petitioners. No. 21.

And now come the petitioners and move that a general default as to all parties defendant, whether named in the notice or not, who have not appeared or answered be entered, except as to any and all parties interested in the registration of section B, described in their petition, and that as to said section B further proceedings be continued to April 3d, 1899, at 10 a. m., to await the determination of the questions raised in the writ of prohibition against the judges of this court now pending in the supreme judicial court for said county of Suffolk and numbered 6415 on the court files, and that as to

l sections L, M, O, and P hearing on the registration of the same l all other questions before the court relating thereto or raised in ir said petition be continued to February 13th, 1899, at 10 o'clock the forenoon.

DAVID E. GOULD.
GEORGE H. JONES.

& 53 [Endorsed:] No. 21. David E. Gould *et al.*, petitioners. Motion for general default and continuance. Motion owed. Leonard A. Jones, judge. Court of registration. Filed Jan. 30, 1899, 10 o'clock 5 min. a. m.

[Endorsed:] No. 6415. Law. William B. Tyler, petitioner, *vs.* Judges of the Court of Registration. Certified pies from court of registration referred to in answer. Annex X.

& 56 WILLIAM B. TYLER, Petitioner,
v.
HE JUDGES OF THE COURT OF REGISTRATION, Respondents.

ANNEX Y.

Rules of the Court of Registration.

7 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court.

Whereas, by the land registration act, being chapter 562 of the cts of the Year 1898, it is provided that the court of registration shall from time to time make general rules and forms for procedure, conforming as near as may be to the practice in the probate ourts, but subject to the express provisions of this act and to general laws," and that "such rules and forms before taking effect shall e approved by the supreme judicial court or a justice thereof;" and hereas the court of registration has prepared certain general rules nd forms for procedure in said court, which are hereto annexed, and has submitted them to this court for approval, in accord-
8 ance with said statute; and whereas said rules and forms have been examined by the justices of this court:

It is thereupon ordered, that said rules and forms be approved, to ake effect and have force in the court of registration in this Commonwealth from and after the fourteenth day of October, A. D. ighteen hundred and ninety-eight.

WALBRIDGE A. FIELD.
OLIVER W. HOLMES.
JOHN LATHROP.
JOHN W. HAMMOND.

February 2, 1899.

59 COMMONWEALTH OF MASSACHUSETTS:

To the honorable the justices of the supreme judicial court:

The court of registration, being authorized to make rules for procedure therein, has prepared, approved, and herewith submits

the following rules, to the end that the same may be approved, altered, or amended by the supreme judicial court, and thereafter take effect and be in force throughout the Commonwealth.

LEONARD A. JONES,
CHARLES THORNTON DAVIS, *Judges.*

60 *Rules of the Court of Registration.*

I.

The land registration office shall be open from the hour of nine in the forenoon until four in the afternoon every day in the year, except on Sundays and holidays, and except that on Saturdays it shall be open only till one o'clock in the afternoon.

II.

The court shall be open each day at the hour of ten in the forenoon.

III.

Upon the entry of every petition for registration the name of the petitioner's attorney shall be entered in the recorder's docket.

IV.

A petitioner for registration upon filing his petition shall
61 deposit with the recorder or assistant recorder the sum of twenty-five dollars, and the further sum of one-tenth of one per cent. of the assessed value of the real estate on the basis of the last assessment for municipal taxation, to be applied to the fees and expenses payable under the land registration act. If any surplus remains after the requirements of said act are met, it shall be returned to the applicant. If such deposit be not sufficient to meet such requirements a further deposit shall be made upon request of the recorder.

The petitioner shall also, before a decree of confirmation and registration is entered, deposit with the recorder the further amount of one-tenth of one per cent. of such assessed value of the real estate, as an assurance fund in accordance with section 94 of said act.

V.

Any examiner of titles appointed under the land registration act
may examine titles assigned to him in any county. He may
62 appear and act as counsel for any petitioner for the registration of any title not referred to him for examination; but as to titles so referred to him he shall not act as counsel for any party other than the Commonwealth.

No attorney for any petitioner shall appear or act for or in behalf of any respondent or adverse claimant.

VI.

If a party shall change his attorney, pending any proceeding, the name of the new attorney shall be substituted on the docket for

that of the former attorney, and notice thereof given to any adverse party; and until such notice of the change of an attorney all notices given to or by the attorney first appointed shall be considered in all respects as notice to or from his client, except in cases in which by law the notice is required to be given to the party personally;
63 provided, however, that nothing in these rules shall be construed to prevent any party interested from appearing for himself in the manner provided by law; and in such case the party so appearing shall be subject to the same rules that are or may be provided for attorneys in like cases, so far as the same are applicable.

VII.

In addition to making appointments of guardians *ad litem* in cases required by statute, whenever it shall appear that a minor is interested in any land in regard to which proceedings are pending, a guardian *ad litem* for such minor may be appointed by the court at its discretion, with or without notice.

VIII.

The court may grant commissions to take the depositions of witnesses without the Commonwealth; and any party may, on application to the recorder, obtain a commission, which shall be directed to any commissioner appointed by the governor of the Com-
64 monwealth to take depositions in any other of the United States, or the commission may be directed to any justice of the peace, notary public or other officer legally empowered to take depositions or affidavits in the State or country where the deposition is to be taken. In each case the deposition shall be taken upon interrogatories to be filed by the party applying for the commission and upon such cross-interrogatories as may be filed by the adverse party, or by the examiner of titles acting in the case, the whole of which interrogatories shall be annexed to the commission. The party applying for the commission shall in each case file his interrogatories in the recorder's office and give notice thereof to the adverse party, or his attorney, and to the examiner of titles, seven days at least before taking out the commission, and at least fourteen days before, if the party or his attorney live out of the Commonwealth. But where the adverse party does not appear, such
65 interrogatories need not be exhibited to him, nor notice be given to him of the same. And when a deposition shall be taken and certified by any person as a justice of the peace or other officer as aforesaid, by force of such commission, if it shall be objected that the person so taking and certifying the same was not such officer, the burden of proof shall be on the party so objecting; and, if a like objection shall be made to a deposition taken without such commission, it shall be incumbent on the party producing the deposition to prove that it was taken and certified by a person duly authorized.

IX.

In all cases where depositions shall be taken on interrogatories, no party shall be permitted to attend at the taking of such deposition, either himself, or by an attorney or agent; nor be permitted to communicate by interrogatories or suggestions with the deponent while giving his deposition. It shall be the duty of the
66 commissioner to take such deposition in a place separate and apart from all other persons, and to permit no person to be present during such examination except the deponent and himself, and such disinterested person, if any, as he may think fit to appoint as a clerk to assist him in reducing the deposition to writing. And it shall be the duty of the commissioner to put the several interrogatories and cross-interrogatories to the deponent in their order, and to take the answer of the deponent to each, fully and clearly, before proceeding to the next; and not to read to the deponent, nor permit the deponent to read, a succeeding interrogatory, until the answer to the preceding has been fully taken down; and it shall be the duty of the recorder, on issuing a commission to take a deposition on interrogatories, to insert the substance of this order therein; or to annex this order, or the substance thereof, to the commission, by the way of notice and instruction to the commissioner.

67 X.

All depositions shall be opened and filed by the recorder when received. The deposition shall afterwards be in his custody, subject to the order of the court, as other documents in the case; and if not read on the trial by the party taking it, it may be used by any other party, if he sees fit, he paying the costs of taking the same.

XI.

Whenever, in any case, a notice given in accordance with the land registration act, or the general forms of procedure, or otherwise, is held by the court to be insufficient, it may order such further notice as the case requires.

XII.

The court may in its discretion allow the parties to amend their pleadings, and order or permit pleadings to be filed, or any
68 proceeding to be had, at other times than are provided in these rules; and may in all cases impose just and reasonable terms upon the parties.

XIII.

When a default is entered in an action it shall not be stricken off after the day upon which it is entered, except upon notice to the adverse party, and upon an affidavit of merits in the defence, with a statement of its nature, and proof to the satisfaction of the court that a defence is in good faith intended.

XIV.

Motions may be heard by a judge in open court, or at chambers, as he shall appoint.

XV.

When any matter shall be referred to a master he shall assign a time and place for hearing, which shall be not less than ten days thereafter; and the party in whose behalf the reference is made shall serve the adverse party, at least seven days before the
69 time appointed for the hearing, with a summons, or such other notice as may be ordered by the court, requiring his attendance at such time and place, and make proof thereof to the master; and thereupon, if the party summoned shall not appear to show cause to the contrary, the master may proceed *ex parte;* and if the party obtaining the reference shall not appear at the time or place, or show cause why he does not, the master may proceed *ex parte.*

XVI.

When the master has prepared a draft copy of his report he shall notify the parties or their attorneys of a time and place when and where they may attend to hear the same, and suggest such alterations, if any, as they may think proper; upon consideration whereof the master will finally settle the draft of his report, and give notice thereof to the parties or their attorneys, whereupon, after ex-
70 amining the same, or being furnished with a copy thereof, if they so request, and pay the usual fees therefor, five days shall be allowed for bringing in written objections thereto, which objections, if any, shall be appended to the report. No exception to a master's report will be allowed without a special order of the court, unless founded upon an objection made before the master, and shown by his report, and unless filed with the recorder within fourteen days from the filing of the report. Notice of the filing of a master's report shall be forthwith sent by the recorder to each party or his attorney.

XVII.

When exceptions shall be taken to the report of a master, they shall be filed with the recorder, and notice thereof shall forthwith be given to the adverse party; and the exceptions shall then be set down for argument. In every case the exceptions shall briefly and clearly specify the matter excepted to, and the cause thereof;
71 and the exceptions shall not be valid as to any matter not so specified.

XVIII.

The date of the transcription of the decree into the registration book shall be taken to be the time at which the assistant recorder receives the certified copy of the decree for transcription; and he shall minute upon such copy and also in the registration book the day, hour and minute of its reception.

Every new certificate shall bear date as of the time of reception noted on the instrument of transfer.

XIX.

When a deed of conveyance of registered land is presented to the assistant recorder in the district where the land lies, such assistant recorder shall not receive the same or enter and issue a certificate of title of such land to the grantee unless, the grantor being unmarried or having no husband or wife to join, it contains a statement to that effect; or, if the grantor is married, unless the deed of conveyance, in case the registered owner is the husband, is also executed by his wife in release of dower and homestead in the granted premises; or, in case the registered owner is the wife, unless the deed is also executed by her husband in release of all interest in the granted premises.

72

The deed shall be received and a new certificate shall be entered and issued by an assistant recorder of the district in which the land lies, when a deed of transfer is executed as aforesaid and acknowledged in the manner now required in this Commonwealth for recording in the register of deeds by the registered owner, conveying in fee-simple the entire parcel of land registered under one certificate of title, and there is presented to such assistant recorder the registered owner's duplicate certificate; provided the land conveyed by such deed is described in the same terms as in the grantor's original certificate; and provided the grantor or grantors in such deed are the same as the registered owner or owners in such certificate.

73

If the land conveyed by such deed is not described in the same terms as in the certificate of title to such land, or the grantor or grantors in such deed are not the same as the registered owner or owners, the assistant recorder shall not receive the deed or issue a new certificate, but shall forthwith refer the matter to the court for its direction.

XX.

When the owner of registered land transfers a part of it, his transfer shall be accompanied by a plan, showing the land transferred, which shall be signed by such owner and by his grantee as correct.

The assistant recorder shall enter and issue a certificate for such part to the grantee, when the description of the land in the deed of transfer agrees with such plan; and shall enter and issue to the grantor a certificate of the remainder described as in the surrendered certificate, omitting the land transferred, the plan and certificate of which shall be referred to.

74

XXI.

When a lease has been noted upon the registration book and upon the owner's duplicate certificate as an incumbrance, and the lease has been determined by lapse of time, merger, surrender, re-

entry or otherwise, the assistant recorder may note its dertemination in the registration book and upon the owner's duplicate certificate, upon the surrender of the lessee's duplicate certificate, if such certificate has been issued; but if no such certificate has been issued, the assistant recorder shall note the determination of the lease only upon the written consent of the lessee, or order of court as hereinafter provided.

75 In case the lessee neglects or refuses to give his consent in writing to the entry of a memorandum of the determination of the lease, the owner of the registered land or any person interested in it may apply to the court of registration for an order directing the entry of such a memorandum, and upon notice of such application to the lessee and other persons interested, and the production of such evidence as shall satisfy the court that the lease has terminated, the court shall make such order.

XXII.

When an instrument executed by an attorney under letters of attorney duly acknowledged is filed or presented for registration, the attorney shall make and subscribe an oath before a justice of the peace, or other officer empowered to administer oaths, that the principal was alive at the date of the execution of the instrument, and that the power was then in force and not revoked.

76

XXIII.

A registered owner or mortgagee whose name has been changed since the entry of a certificate, either by decree of the probate court, by marriage, divorce or adoption, or whose name was by mistake wrongly expressed in the certificate, may, upon satisfying the court of the fact, surrender the duplicate certificate and take out a new one in his new or correct name; or a memorandum of such change or correction may by order of the court be entered on the certificate.

XXIV.

Two or more parcels of land may be included in one application provided they constitute one holding under one and the same title.

Rule.

Affidavit of merits required for striking off default XIII
Amendments allowed by court XII
Application may include two or more parcels, when XXIV
Assistant recorder not to issue new certificate in certain cases XIX
to enter new certificate upon sale of part XX
to issue new certificate, when XIX
Assurance fund, when payment to be made to IV
Attorney, change of, pending proceeding VI
executing instrument under power XXII
oath that principal was alive XXII
. petitioner's, not to act for respondent V
petitioner's, to enter name on docket III
Burden of proof as to officer taking deposition VIII
Certificate, new, to bear what date XVIII
when assistant recorder may enter XIX
when part of land transferred XX
Chambers, motions may be heard at XIV
Commission to take depositions out of State VIII
Commissioner taking deposition to follow instructions IX
78 *Court* may allow amendments XII
may order further notice XI
open at what hour II
Date of new certificate XVIII
of transcription of decree XVIII
Decree, hour and minute of reception of XVIII
date of transcription of XVIII
Deed of transfer to be duly executed and acknowledged XIX
to follow description in certificate XIX
to pass estate in fee-simple XIX
to state whether grantor is married XIX
Default, removal after day on which it was entered XIII
stricken off upon notice XIII
Defence in good faith shown for removing default XIII
to be stated before default removed XIII
Deposit for assurance fund IV
of fees on filing petition IV
Depositions, duties of commissioner taking IX
how taken out of State VIII
no party to attend the taking of IX
out of State, before whom taken VIII
taken on interrogatories filed VIII
to be in custody of recorder X
when may be used by other party X
when to be opened and filed X
Description of land in deed and certificate to be same XIX
Examiner of titles may act as counsel for whom V
may act in any county V
Exceptions to master's report by special order XVI
79 to master's report how framed XVI
to master's report set down for argument XVI
to master's report, when to be filed XVI
Grantor in deed of transfer to state whether married XIX
married, to be joined by wife or husband XIX
Guardian ad litem, appointed with or without notice VI
Husband and wife to join in deed of transfer XIX
Interrogatories for taking depositions VIII
Lease, determination of, noted by order of court XXI
determination noted upon surrender of certificate XXI
determination of, when no certificate issued XXI
Master may proceed *ex parte*, when XV
to assign time and place for hearing XV
to notify parties of draft of his report XV
report, exceptions to XV
report, objections to XV
report, time for filing objections to XV

Memorandum of change of name of registered owner XXIII
Motions may be in open court or chambers XIV
Name of registered owner changed XXIII
memorandum of, how entered XXIII
Notice by master of drafting of report XVI
further, ordered by court XI
of hearing before master XV
of interrogatories filed for deposition VIII
in case adverse party does not appear VIII
to attorney whose name is on docket VI
80-82 *Notice* to parties of filing master's report XVI
Office open during what hours I
Petitioner may appear for himself VI
to deposit fees upon filing petition IV
Plan of part of land sold, referred to in new certificate XX
when part of land is transferred XX
Registration book, transcription of decree in XVIII
Terms imposed on allowing amendments XII
Witnesses out of State, depositions of VIII

(Here follows diagram marked page 83. Omitted in printing per stipulation.)

84&85 Whereupon, on the twenty-seventh day of said February, a hearing was had, and the question of the constitutionality of the statute of 1898, chapter 562, was reserved, at the request of parties, by the justice who presided at the hearing, for the determination of the full court, and the case reported to said court.

86&87 And now, on the third day of January, A. D. 1900, the parties appeared, and it is ordered by the supreme judicial court for the Commonwealth, by its rescript, as follows, viz:

88&89 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, January, 1900.

In the case of—

WILLIAM B. TYLER
vs.
JUDGES OF THE COURT OF REGISTRATION,

pending in the supreme judicial court for the county of Suffolk:

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Petition denied.

By the court:

HENRY A. CLAPP, *Clerk.*

January 3, 1900.

90-93 And thereupon, in accordance with said rescript, the following final decree is entered by our said court, to wit:

94 & 95 SUFFOLK, *ss*:

In the Supreme Judicial Court.

WILLIAM B. TYLER, Petitioner,
v.
THE JUDGES OF THE COURT OF REGISTRATION, Respondents.

This case having been reserved for the consideration of the full court, and the full court, after hearing the same, having decided that the provisions of the land registration act of this Commonwealth, in the petition mentioned and amendments thereof, whereby a decree of registration entered in pursuance of the said statutes is made conclusive upon and against all persons as therein provided, are valid and not repugnant to the Constitution of the United States or to the constitution of this Commonwealth, and having decided that the said statutes do not give to the recorder and assistant recorders therein mentioned judicial powers contrary to the constitution of this Commonwealth, and having decided that the provisions of the said statutes relating to transfers and dealings with registered land after original registration are valid and not repugnant to the Constitution of the United States or the constitution of this Commonwealth, now, in pursuance of the said decision and upon hearing counsel for the parties, it is ordered and decreed that the prayer of the petition for a writ of prohibition be denied, and that the petition do stand dismissed out of this court.

By the court:

JOHN NOBLE, *Clerk.*

February 9, 1900.

96 & 97 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

Witness Oliver Wendell Holmes, Esquire, chief justice of our said supreme judicial court, at Boston, in said county, this twentieth day of February, in the year of our Lord nineteen hundred.

[SEAL.] JOHN NOBLE, *Clerk.*

98 & 99 In the Supreme Court of the United States.

Between—

WILLIAM B. TYLER, Petitioner, Plaintiff in Error,
and
THE JUDGES OF THE COURT OF REGISTRATION, Respondents, Defendants in Error.

Assignment of Errors.

And the said William B. Tyler says that in the record and proceedings aforesaid and in making the decree aforesaid there is manifest error in this, to wit:

1. That by the record aforesaid it appears that it was decided in and by the said decree that the provisions of the land registration act therein mentioned and amendments thereof, whereby a decree of registration is made conclusive upon and against all persons as therein provided, were valid and not repugnant to the Constitution of the United States, whereas it ought to have been decided that the said provisions were not valid and were repugnant to the provision of the said Constitution that no State shall de-
100 & 101 prive any person of property without due process of law.

2. There is also manifest error in this, to wit, that by the record aforesaid it appears that it was decided in and by the said decree that the provisions of the said statutes relating to transfers and dealings with registered land after original registration were valid and repugnant to the Constitution of the United States, whereas it ought to have been decided that the said provisions were not valid and were repugnant to the provision above mentioned of the said Constitution.

3. There is also manifest error in this, to wit, that by the record aforesaid it appears that the prayer of the petition therein mentioned for a writ of prohibition was denied by the said decree, whereas a writ of prohibition ought to have been thereby granted as in the said petition prayed.

And the said William B. Tyler prays that the said decree for the errors aforesaid and others in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said decree.

J. L. THORNDIKE,
Counsel for the Plaintiff in Error.

102 & 103 COMMONWEALTH OF MASSACHUSETTS, *Suffolk County.*

Supreme Judicial Court.

WILLIAM B. TYLER, Petitioner,
v.
THE JUDGES OF THE COURT OF REGISTRATION, Respondents.

Reservation.

This case came on to be heard before me. The only question raised at the hearing was whether St. 1898, c. 562, was constitutional. This question I reserve for the determination of the full court, and report the case, by request of the parties, upon the petition and answer, together with the rules of the court of registration and the set of certified documents referred to in the answer and made part of the case. The parties have agreed that at the argument there may be furnished to the court pamphlet copies of said

act, and such blank forms for procedure made by the said court registration and approved by this court, as any party may des

JOHN W. HAMMOND, *J. S. J.*

104 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *January* 10, 190

I certify the annexed to be a true copy of the opinion of the preme judicial court in the case of Tyler *vs.* Judges of Court Registration decided on the 3rd day of January, 1900.

GEO. F. TUCKER,
Reporter of Decisions

105 & 106 TYLER
vs.
JUDGES OF THE COURT OF REGISTRATION.

HOLMES, *C. J.:*

This is a petition for a writ of prohibition against the judges the court of registration established by St. 1898, c. 562, and is brou to prevent their proceeding upon an application concerning la in which the petitioner claims an interest. The ground of the p tion is that the act establishing the court is unconstitutional. T reasons are urged against the act, both of which are thought to go the root of the statute and to make action under it impossible. T first and most important is that the original registration depri all persons except the registered owner of any interest in the la without due process of law. There is no dispute that the object the system, expressed in s. 38, is that the decree of registrat "shall bind the land and quiet the title thereto," and "shall conclusive upon and against all persons," whether named in t proceedings or not, subject to few and immaterial exceptions; a this being admitted, it is objected that there is no sufficient proc against or notice to persons having adverse claims in a proceedi intended to bar their possible rights.

The application for registration is to be in writing and sign and sworn to. It is to contain an accurate description of the la to set forth clearly other outstanding estates or interests known the petitioner, to identify the deed by which he obtained title, state the name and address of the occupant, if there is one, and a to give the names and addresses, so far as known, of the occupa of all lands adjoining. S. 21. As soon as it is filed a memorandu containing a copy of the description of the land concerned is to filed in the registry of deeds. S. 20. The case is immediately ferred to an examiner (appointed by the judge, s. 12), who mak as full an investigation as he can and reports to the court. S. If in the opinion of the examiner the applicant has a good title, alleged, or if the applicant after an adverse opinion elects to proce

107 & 108 further, the recorder is to publish a notice by order of t court in some newspaper published in the district wh any portion of the land lies. This notice is to be

dressed by name to all persons known to have an adverse interest, and to the adjoining owners and occupants so far as known, and to all whom it may concern. It is to contain a description of the land, the name of the applicant, and the time and place of the hearing. S. 31. A copy is to be mailed to every person named in the notice whose address is known, and a duly attested copy is to be posted in a conspicuous place on each parcel of land included in the application by a sheriff or deputy sheriff fourteen days at least before the return day. Further notice may be ordered by the court. S. 32. It will be seen that the notice is required to name all persons known to have an adverse interest, and this of course includes any adverse claim, whether admitted or denied, that may have been discovered by the examiner or in any way found to exist. Taking this into account, we should construe the requirement in s. 21 concerning the application as calling upon the applicant to mention, not merely outstanding interests which he admits, but equally all claims of interest set up, although denied by him. We mention this here to dispose of an objection of detail urged by the petitioner, and we pass to the general objection that, however construed, the mode of notice does not satisfy the constitution, either as to persons residing within the State upon whom it is not served or as to persons residing out of the State and not named.

If it does not satisfy the constitution, a judicial proceeding to clear titles against all the world hardly is possible, for the very meaning of such a proceeding is to get rid of unknown as well as known claims; indeed certainty against the unknown may be said to be its chief end, and unknown claims cannot be dealt with by personal service upon the claimant. It seems to have been the impression of the supreme court of Ohio in the case most relied upon by the petitioner that such a judicial proceeding is impossible in this country. State *v.* Gilbert, 56 Ohio St., 575, 629. But we cannot bring ourselves to doubt that the constitutions
109 & 110 of the United States and of Massachusetts at least permit it as fully as did the common law. Prescription or a statute of limitations may give a title good against the world and destroy all manner of outstanding claims without any notice or judicial proceeding at all. Time and the chance which it gives the owner to find out that he is in danger of losing rights are due process of law in that case. Wheeler *v.* Jackson, 137 U. S., 245, 258. The same result used to follow upon proceedings which, looked at apart from history, may be regarded as standing half way between statutes of limitations and true judgments *in rem*, and which took much less trouble about giving notice than the statute before us. We refer to the effect of a judgment on a writ of right after the mise joined and the lapse of a year and a day—Booth, Real Actions, 101, *in margine*; Fitz. Abr. Continual Claim, pl. 7, *Faux Recovere*, pl. 1; y. B., 5 Ed. III., 51, pl. 60—and of a fine with proclamations after the same time or by a later statute after five years. 2 Bl. Comm., 354; 2 Inst., 510, 518; St. 18 Ed. I., *modus levandi fines*; 34 Ed. III, c. 16; 4 Hen. VII, c. 24; 32 Hen. VIII, c. 36. It would have astonished John Adams to be told that the framers of our Con-

stitution had put an end to the possibility of these ancient institutions. A somewhat similar statutory contrivance of modern days has been held good. Turner *v.* New York, 168 U. S., 90. Finally, as was pointed out by the counsel for the petitioners, a proceeding *in rem* in the proper sense of the word might give a clear title without other notice than a seizure of the *res* and an exhibition of the warrant to those in charge. 2 Browne, Civ. & Adm. Law, 398. The general requirement of advertisement in admiralty cases is said to be due to rules of court. U. S. Adm. Rule 9; Betts, Adm. Practice (1838), 33, 34, App. 14.

The prohibition in the fourteenth amendment against a State depriving any person of his property without due process of law and that in the twelfth article of the Massachusetts bill of rights refer to somewhat vaguely determined criteria of justification which may be found in ancient practice—Murray *v.* Hoboken
111 & 112 Land Co., 18 How., 272, 277—or which may be found in convenience and substantial justice, although the form is new. Hurtado *v.* California, 110 U. S., 516, 528, 531—Holden *v.* Hardy, 169 U. S., 366, 388, 389. The prohibitions must be taken largely with a regard to substance rather than to form, or they are likely to do more harm than good. It is not enough to show a procedure to be unconstitutional to say that we never have heard of it before. Hurtado *v.* California, 110 U. S., 516, 537.

Looked at either from the point of view of history or of the necessary requirements of justice, a proceeding *in rem* dealing with a tangible *res* may be instituted and carried to judgment, without personal service upon claimants within the State or notice by name to those outside of it, and not encounter any provision of either constitution. Jurisdiction is secured by the power of the court over the *res*. As we have said, such a proceeding would be impossible were this not so, for it hardly would do to make a distinction between the constitutional rights of claimants who were known and those who were not known to the plaintiff, when the proceeding is to bar all. Pennoyer *v.* Neff, 95 U. S., 714, 727; The Mary, 9 Cranch, 126, 144; Mankin *v.* Chandler, 2 Brock, 125, 127; Brown *v.* Levee Commissioners, 50 Miss., 468, 481. 2 Freeman, Judgments, 4th ed., ss. 606, 611. In Hamilton *v.* Brown, 161 U. S., 256, a judgment of escheat was held conclusive upon persons notified only by advertisement to all persons interested. It is true that the statute under consideration required the petition to name all known claimants and personal service to be made on those so named. But that did the plaintiffs no good, as they were not named. So a decree allowing or disallowing a will binds everybody, although the only notice of the proceedings given be a general notice to all persons interested. And in this case, as in that of escheat just cited, the conclusive effect of the decree is not put upon the ground that the State has an absolute power to determine the persons to whom a man's property shall go at his death, but upon the characteristics of a
113 & 114 proceeding *in rem*. Bonnemort *vs.* Gill, 167 Mass., 338, 340. See 161 U. S., 263, 274. Admiralty proceed-

gs need only to be mentioned in this connection, and further
ation of cases seems unnecessary.

Speaking for myself, I see no reason why what we have said as to
oceedings *in rem* in general should not apply to such proceedings
ncerning land. In Arnold *v.* Griggs, 134 U. S., 316, 327, it is said
be established that "a State has power by statute to provide for
e adjudication of titles to real estate within its limits as against
n-residents who are brought into court only by publication." In
amilton *v.* Brown, 161 U. S., 256, 274, it was declared to be within
e power of a State "to provide for determining and quieting the
le to real estate within the limits of the State and within the juris-
ction of the court after actual notice to all known claimants
d notice by publication to all other persons." I doubt whether
e court will not take the further step when necessary and declare
e power of the States to do the same thing after notice by publi-
tion alone. See Huling *v.* Kaw Valley Railway & Improvement
., 130 U. S., 559, 564; Parker *v.* Overman, 18 How., 137, 140, 141.
ut in the present case provision is made for notice to all known
aimants by the recorder, who is to mail a copy of the published
otice to every person named therein whose address is known.
32. We shall state in a moment our reasons for thinking this
rm of notice constitutional. See, further, Cook *v.* Allen, 2 Mass.,
2, 469, 470; Dascomb *v.* Davis, 5 Met., 335, 340; Brock *v.* Old
olony Railroad, 146 Mass., 194, 195.

But it is said that this is not a proceeding *in rem*. It is certain
at no phrase has been more misused. In the past it has had little
ore significance than that the right alleged to have been vio-
ted was a right *in rem*. Austin thinks it necessary to quote
eibnitz for the sufficiently obvious remark that every right to
estitution is a right *in personam*. So as to actions. If the tech-
ical object of the suit is to establish a claim against some par-
cular person, with a judgment which generally in theory at
least binds his body, or to bar some individual
15 & 116 claim or objection, so that only certain persons are en-
titled to be heard in defence, the action is *in personam*,
lthough it may concern the right to or possession of a tangible
hing. Mankin *v.* Chandler, 2 Brock., 125, 127. If, on the other
and, the object is to bar indifferently all who might be minded to
ake an objection of any sort against the right sought to be estab-
shed, and if any one in the world has a right to be heard on the
trength of alleging facts which, if true, show an inconsistent inter-
st, the proceeding is *in rem*. 2 Freeman, Judgments, 4th ed., s.
06, *ad fin.* All proceedings, like all rights, are really against per-
ons. Whether they are proceedings or rights *in rem* depends on
he number of persons affected. Hence the *res* need not be person-
fied and made a party defendant, as happens with the ship in the
dmiralty; it need not even be a tangible thing at all, as sufficiently
ppears by the case of the probate of wills. Personification and
aming the *res* as defendant are mere symbols, not the essential
natter. They are fictions, conveniently expressing the nature of
he process and the result; nothing more.

It is true as a historical fact that these symbols are used in admiralty proceedings, and also, again merely as a historical fact, that proceedings *in rem* have been confined to cases where certain classes of claims, although of very divers sorts, for indemnification, for injury, for wages, for salvage, &c., are to be asserted. But a ship is not a person. It cannot do a wrong or make a contract. To say that a ship has committed a tort is merely a shorthand way of saying that you have decided to deal with it as if it had committed one because some man has committed one in fact. There is no *a priori* reason why any other claim should not be enforced in the same way. If a claim for a wrong committed by a master may be enforced against all interests in the vessel, there is no juridical objection to a claim of title being enforced in the same way. The fact that it is not so enforced under existing practice affords no test of the powers of the legislature. The contrary view
117 & 118 would indicate that you really believed the fiction that a vessel had an independent personality as a fact behind the law. Furthermore, naming the *res* as defendant, although a convenient way of indicating that the proceeding is against property alone—that is to say, that it is not to establish an infinite personal liability—is not of the essence. If in fact the proceeding is of that sort and is to bar all the world, it is a proceeding *in rem*.

So as to seizure of the *res*. It is convenient in the case of a vessel in order to secure its being on hand to abide judgment, although in the case of a suit against a man jurisdiction is regarded as established by service without the need of keeping him in prison to await judgment. It is enough that the personal service shows that he could have been seized and imprisoned. Seizure, to be sure, is said to be notice to the owner. Scott *v.* Shearman, 2 W. Bl., 977, 979; Mankin *v.* Chandler, 2 Brock., 125, 127. But fastening the process or a copy to the mast would seem not necessarily to depend for its effect upon the continued custody of the vessel by the marshal. However this may be, when we come to deal with immovables there would be no sense whatever in declaring seizure to be a constitutional condition of the power of the legislature to make a proceeding against land a proceeding *in rem*. Hamilton *v.* Brown, 161 U. S., 256, 274. The land cannot escape from the jurisdiction, and except as security against escape seizure is a mere form, of no especial sanctity, and of much possible inconvenience.

I do not wish to ignore the fact that seizure when it means real dispossession is another security for actual notice. But when it is considered how purely formal such an act may be, and that even adverse possession is possible without ever coming to the knowledge of a reasonably alert owner, I cannot think that the presence or absence of the form makes a constitutional difference, or rather, to express my view still more cautiously, I cannot but think that the immediate recording of the claim is entitled to equal effect from a constitutional point of view. I am free to confess, however, that with the rest of my brethren I think the act ought to be amended in the direction of still further precautions to secure
119 & 120 actual notice before a decree is entered, and that if it is not amended the judges of the court ought to do all

at is in their power to satisfy themselves that there has been no
lure in this regard before they admit a title to registration.
The quotations which we have made show the intent of the stat-
e to bind the land and to make the proceedings adverse to all the
orld, even if it were not stated in s. 35 or if the amendment of
99 did not expressly provide that they should be proceedings *in*
n. St. 1899, c. 133, s. 1. Notice is to be posted on the land just
admiralty process is fixed to the mast. Any person claiming an
terest may appear and be heard. S. 34.
But perhaps the classification of the proceeding is not so impor-
nt as the course of the discussion thus far might seem to imply.
have pursued that course as one which is satisfactory to my own
ind, but for the purposes of decision a majority of the court prefer
assume that in cases in which under the constitutional require-
ents of due process of law it heretofore has been necessary to give
parties interested actual notice of the pending proceeding by
rsonal service or its equivalent in order to render valid judgment
gainst them, it is not in the power of the legislature, by changing
e form of the proceeding from an action *in personam* to a suit *in*
m, to avoid the necessity of giving such a notice, and to assume
at under this statute personal rights in property are so involved
d may be so affected that effectual notice and an opportunity to
e heard should be given to all claimants who are known or who
y reasonable effort can be ascertained.
It hardly would be denied that the statute takes great precau-
ons to discover outstanding claims, as we already have shown in
etail, or that notice by publication is sufficient with regard to claim-
nts outside the State. With regard to claimants living within the
State and remaining undiscovered, notice by publication
21 & 122 must suffice of necessity. As to claimants living within
the State and known, the question seems to come down to
hether we can say that there is a constitutional difference between
ending notice of a suit by a messenger and sending it by the post-
ffice and beside publishing in a newspaper, recording in the regis-
ry, and posting on the land. It must be remembered that there is
o constitutional requirement that the summons, even in a personal
ction, shall be served by an officer, or that the copy served shall be
fficially attested. Apart from local practice, it may be served by
ny indifferent person. It may be served on residents by leaving a
opy at the last and usual place of abode. When we are consider-
ng a proceeding of this kind it seems to us within the power of the
egislature to say that the mail as it is managed in Massachusetts is
sufficient messenger to convey the notice when other means of
otifying the party like publishing and posting also are requisite.
We agree that such an act as this is not to be upheld without anxiety.
But the difference in degree between the case at bar and one in
hich the constitutionality of the act would be unquestionable seems
o us too small to warrant a distinction. If the statute is within
he power of the legislature, it is not for us to criticise the wisdom
r expediency of what the legislature has done.
We do not think it necessary to refer to the elaborate collection

of statutes presented by the Attorney General for the purpose of showing that the principal of the present act is old. Although no question is made on that point, we may mention that an appeal is given to the superior court with the right to claim a jury. In our opinion the main objection to the act fails. See Sheperd *v.* Ware, 46 Minn., 174; People *v.* Simon, 176 Ill., 165; Short *v.* Caldwell, 155 Mass., 57, 59; Loring *v.* Hildreth, 170 Mass., 328.

The other objection to the constitutionality of the statute is with regard to the powers and duties of the recorder and assistant recorder. It is said that they are given judicial powers after the original registration, although not judicial officers under the
123 & 124 Constitution. The act of registration is the operative act to convey title, s. 50, and by the act of 1898 the assistant recorder does it unless in doubt. SS. 53, 55, 57, 58, 61, 62, 63. It is said that as his decision affects title it must be judicial. But here again it is necessary to use a certain largeness in interpreting broad constitutional provisions. The ordinary business of registration is very nearly ministerial. There is no question to be raised or which can be raised. If there is a question, either raised by any party in interest or occurring to the assistant recorder, it is to be referred to the judge for decision. S. 53. But whatever may be thought of the original act, by amendment even the ordinary business is to be done only "in accordance with the rules and instructions of the court." St. 1899, c. 131, s. 8. Under this amendment registration is the act of the court. The fact that it may be done by the assistant recorder under general orders when there is no question is not different from the power of the clerk to enter a judgment in cases ripe for judgment under a general order or ruling of the superior court. It should be observed that by s. 55 the production of the owner's duplicate certificate, whenever any voluntary instrument is presented for registration, is conclusive authority from the registered owner for the entry of a new certificate or the making of a memorandum of registration, and that a registration procured by presenting a forged certificate, &c., is void.

Finally, it is said that there is no provision for notice before registration of transfers or dealings subsequent to the original registration. It must be remembered that at all later stages no one can have a claim which does not appear on the face of the registry. The only rights are registered rights, and when land is brought into the registry system there seems to be nothing to hinder the legislature from fixing the conditions upon which it shall be held under that system. People *v.* Simon, 176 Ill., 165, 176. By s. 45 the obtaining of a decree of registration, which is a voluntary act, is an agreement running with the land that the land shall be and remain registered land and subject to the provisions of the act.
125 & 126 Furthermore, in deciding whether substantial justice is done it is to be borne in mind that ordinary cases will present no question at all. It is contemplated, as we have said, that if there is a question to be discerned it shall be referred to the court, and of course that the court will order notice to any party interested. The act shows throughout the intent that no one shall

be concluded without having a chance to be heard, and, although some of its methods are new to this Commonwealth, we cannot say that the precautions as to notice are insufficient in substance or form.

Petition denied.

127 & 128 TYLER
v.
JUDGES OF THE COURT OF REGISTRATION.

LORING, *J.*:

I dissent from the opinion of the majority of the court and think it proper to state the reasons which have brought me to the opposite conclusion.

It will be necessary to add to the statement of the general scope of the act, which is given in the opinion, by setting forth with some particularity those provisions which, in the opinion of the majority of the court, sufficiently secure to those having adverse interests that opportunity to be heard in defence of their rights of property which is guaranteed to them by the constitutional provisions, that they shall not be deprived of their property except by due process of law or the law of the land. Fourteenth amendment of the Constitution of the United States; Massachusetts declaration of rights, art. XII.

By ss. 31 and 32 notice of the application is to be issued by the court in a form specified in the act addressed to all known persons who claim an adverse interest and "to all whom it may concern," and the return day of the notice is to be not less than twenty nor more than sixty days from the date of the notice.

This notice is to be served (1) by publication "in some newspaper published in the district where any portion of the land lies" (s. 31), (2) by posting it "in a conspicuous place on each parcel of" the land in question fourteen days before the return day (s. 32), and (3) by mailing a copy "to every person named therein whose address is known" within one week after publication in the newspaper. The posting of the notice is to be performed by a sheriff or his deputy (s. 32), the publication and mailing by the recorder of the court (ss. 31, 32), and the return of the former and the affidavit of the latter are made by s. 32 "conclusive proof of such service."

It is provided that by the description in the notice "to all whom it may concern" "all the world are made parties defendant and shall be concluded by the default and order" (s. 35) which, by the terms of s. 36, "shall first be entered against all per-
129 & 130 sons who do not appear and answer" on the return day.

Thirty days are allowed for an appeal from a decree in favor of the applicant (s. 14), and on the expiration of that time by the express provisions of s. 38 the decree confirming and registering the applicant's title "shall not be opened by reason of the absence, infancy or other disability of any person affected thereby, nor by any proceeding at law or in equity for reversing judgments or de-

crees," except only in case the decree was procured by the fraud of the applicant and rights of innocent third persons have not intervened (s. 38).

The peculiarities of the act consist, first, in the fact that it bars or may bar the true owner by a decree in a proceeding had in his absence of which he did not in fact have notice, and to which he is not named as a party; second, the notice to be given to those who are named therein is inappropriate and inadequate to bring home to them knowledge of the proceeding and enable them to appear and defend their right; third, the return and affidavit of service by the sheriff and the recorder cannot be shown to be either false or incorrect; fourth, the decree made in that proceeding, unlike any other judgment or decree known to the law, is final and not subject to be attacked directly or collaterally, even if made in the absence of the true owner and without the true owner having in fact received any notice of the proceeding.

The chief justice upholds the statute upon the ground that the proceeding is a proceeding *in rem*. If it be such a proceeding it is true that no person need be named as party respondent, and no notice beyond publication need be given. But some of the other justices who concur in the opinion prefer to uphold the statute upon the ground that the opportunity to appear and be heard afforded by the notice here provided is not so far different from that afforded by personal service or its equivalent in an action *in personam* as to forbid the legislature adopting it. On what ground the majority who deny that this is a proceeding *in rem* place their conclusion that those not named as respondents either in the
131 & 132 application or in the notice are barred is not explicitly stated.

I will deal first with the question of the notice to be given to known respondents—that is, to those named in the notice issued by the court. It is patent that one having an adverse interest is not sure to receive notice of the proceeding and to receive that notice in time to be heard. He may not see the notice posted on his own land—the parcel of land may be, for example, woodland and many thousand acres in extent—or the owner may be properly absent from the county for the fourteen days in question, or he may have given possession of the land to a tenant, and therefore properly leave it unvisited, or he may be a remainderman and have no immediate right of entry and certainly no likelihood of seeing a notice posted on the land; again, his interest in the land may be a right of way over or of light and air in the land of his neighbor, or an easement in the nature of an equitable restriction upon the height or position of buildings to be erected and maintained thereupon. In that case the notice would be posted on his neighbor's land, and there is certainly no likelihood that he would see a notice posted there. One publication in one newspaper in the district where the land lies, to be made "immediately upon the filing of the examiner's opinion or the applicant's election, as the case may be," satisfies the statute, and nothing but the statement of that fact is necessary to show that such service of the notice is not certain to reach

all named respondents. The service by mail may be made at any time within seven days after publication in the newspaper. The mail is a good messenger to carry a communication to one whose identity and exact address are known, as is the case where one writes to another with whom he is in regular correspondence, but it is not a good messenger to use in conveying notice to strangers whose identity and address are not necessarily known and must be ascertained *pro hac vice*. This is recognized in the act when it provides that the notice is to be mailed, not to all respondents named in the notice, but to "every person named therein whose address is known." S. 32. Had the provisions required the notice to be mailed to every one named, the practical result would probably have been the same, for the recorder has no means of knowing the identity and proper address of each respondent, and the provision that the affidavit of the recorder in the matter of mailing copies of the notice shall be conclusive takes away from the applicant any temptation to use extraordinary diligence in furnishing to the recorder the exact name and address of those whose interest it will be, if brought in, to defeat the object which he seeks to obtain by bringing his application.

133 & 134

More than that, the mail was originally devised as a means of transmitting messages in business and social life, and not of serving notices of proceedings which may divest one of his property, and it has heretofore been treated as such by the public. A man not in business may reasonably absent himself from the Commonwealth in travelling for pleasure, and direct that all communications addressed to him shall be forwarded to him at specified places where he expects to go, but where he later decides that it is not his pleasure to go. It is probably within the experience of every one that many letters so forwarded are never received.

But the decisive objection to the provisions of the act as to notice to named respondents lies deeper than considerations of this nature alone. It does not depend upon the question whether service by mail is as likely to reach the respondent as service at the defendant's last and usual place of abode, as the opinion would seem to assume.

Each and every statute of Massachusetts, whether passed in the time of the colony, the province, or the Commonwealth, authorizing a judgment on default, based on any but personal service, has given to the defendant, who did not in fact have notice of the proceedings, and therefore no opportunity to be heard before the judgment was rendered, a right to have the judgment vacated on a writ of review. "Such judgments in this State are treated as valid until reversed, for the reason that the parties have an adequate remedy by review or writ of error." Wells, J., in Salem *v.* Eastern Railroad, 98 Mass., 431, 448.

135 & 136

It is definitely settled in other connections that a right of appeal or a right to a review is sufficient to render constitutional a judgment, which, but for the right to that appeal or review, would be void, as not securing to the defendant the rights guaranteed to him by the

Constitution. Jones *v.* Robbins, 8 Gray, 329; Holmes *v.* Hunt, 1
Mass., 505, 516; Foster *v.* Morse, 132 Mass., 354.

The first statute in Massachusetts authorizing a judgment on
fault on any but personal service was the colony act of 1644. Th
act provided that in case property of the defendant was attach
the notice, or, as it is now termed, the separate summons, might
served upon the defendant by leaving the same "at his house
place of usual abode," with a proviso that if the defendant was
the time of service, out of the jurisdiction the case should be c
tinued for a term before execution issued, and no execution sho
then issue until the plaintiff gave security to respond to the defe
ant "if he shall reverse the judgment within one year or su
further time as the court shall permit." Ancient Charters, p.
It is a fact of some interest that this is the origin in this Co
monwealth of writs of review, and in this connection it is of
little importance that the origin of writs of review was to give
defendants who, being served under the statute and being abs
from the colony at the time of service, did not know of the proce
ings an opportunity to have the judgment made in their abse
vacated if they had a good defense to the original claim.

This provision was re-enacted in 1700–1 without substant
change, and was then extended to writs of dower and *scire fac*
It was then provided in the interest of the absent defendant t
"no real estate taken in execution granted upon such first judgm
shall be alienated or passed away until after the expi
137 & 138 tion of the said twelve months, or after a new tr
brought within the said space of twelve months, to
intent that restitution thereof may be made in case as aforesai
1 Prov. Laws, pp. 447, 448.

In 1726 the provisions of the original act were extended to
service of a capias when no attachment was made, and in 1797
writs of ejectment, error, review, to real actions, and generally to
civil actions "wherein the law does not require a separate summ
to be left with the defendant." St. 1797, c. 50, ss. 1–5. The provisi
of this act have since been re-enacted without substantial cha
until this day. Rev. Sts., c. 90, ss. 41, 45, 48; c. 92, ss. 3, 4, 6, 8;
99, s. 17; Gen. Sts., c. 123, ss. 25, 28; c. 126, ss. 6, 7, 8, 10; c. 146
20; Pub. Sts., c. 161, ss. 31, 34; c. 164, ss. 6, 8, 10; c. 187, s. 21.

This right of review has been previously extended to judgme
rendered by justices of the peace and all inferior courts. St. 17
c. 17, s. 3; re-enacted in Rev. Sts., c. 99, s. 27; Gen. Sts., c. 146
24. Pub. Sts., c. 187, s. 25.

In 1820 the right to review a judgment was enlarged by givi
the court power to issue a writ of review, even if the defendant
within the Commonwealth at the time of service at his last a
usual place of abode, provided he did not in fact have notice of
action and applied for a review within a year after he first heard
it. St. 1820, c. 53; James *v.* Townsend, 104 Mass., 367. This
was re-enacted in Rev. Sts., c. 92, s. 5; c. 99, ss. 18–20; Gen. Sts.
146, s. 21; Pub. Sts., c. 187, s. 22.

The Revised Statutes made a further provision in protection of

rights of a defendant in a real action who had not been personally served and against whom judgment had been rendered on a default in his absence, to wit, that if the judgment were reversed within a year the land should be restored. Rev. Sts., c. 92, s. 9.

Without going more particularly into the statutes, it is enough to say that it has always been held in this Commonwealth that a judgment rendered on a default is binding on the de-
139 & 140 fendant when service was made upon him personally. Matthews *v.* Moulton, 135 Mass., 122. But if service was made at his last place of abode or in any way other than by personal service, and he did not in fact have notice of the proceeding, it is not binding upon him; if provision for reopening the judgment is made by review or writ of error, his remedy is to have the judgment vacated by such a proceeding instituted directly for that purpose. Hendrick *v.* Whittemore, 105 Mass., 23; Finneran *v.* Leonard, 7 Allen, 54. If, however, the proceeding is not according to common law, so that error does not lie, the judgment may be attacked collaterally and shown to be void for want of notice when invoked against the defendant. Smith *v.* Rice, 11 Mass., 514; Cook *v.* Darling, 18 Pick., 393. Or if a judgment is rendered in another State against a citizen of this State, or in this State against the citizen of another State, it may be so attacked collaterally when suit is brought on it, because to compel him to have the judgment vacated by writ of error, in which he must file a bond if he would obtain a stay of execution, is to impose a burden not warranted by the fourteenth amendment to the Constitution of the United States. Needham *v.* Thayer, 147 Mass., 536. And on this point generally see the exhaustive opinion of Judge Wells in Salem *v.* Eastern Railroad, 98 Mass., 431.

This doctrine that a defendant is not bound by a judgment rendered on default in his absence, based on a service other than personal service, is not peculiar to Massachusetts, but is of universal application; there is a difference in some States as to the remedy. In some jurisdictions the judgment will not be vacated if the defendant failed to receive notice through a false return of the sheriff, or an unauthorized appearance was made by an attorney, unless a suit on the sheriff's bond or a suit against the attorney fails, in fact, to give him an adequate remedy. Walker *v.* Robbins, 14 How., 584. In Connecticut a bill in equity lies to enjoin the enforcement of a judgment so obtained, though no fraud can be imputed to the plaintiff if the time prescribed by statute for vacating the judgment has expired. Jeffery *v.* Fitch, 46 Conn., 601. In New York it has been held that even after the time prescribed by statute for vacating such a judgment has expired, the court has inherent power to set it aside
if made in the absence of the defendant. Vilas *v.* Platts-
141 & 142 burgh Railroad, 123 N. Y., 440. And there are cases in the Supreme Court of the United States and in this Commonwealth indicating that judgments may be vacated after the term by exercise of the court's inherent power independently of statute. *Ex parte* Arnshaw, 15 Pet., 119; Warren *v.* Stickney, 12

Allen, 1; Gale *v.* Nickerson, 144 Mass., 415; Stickney *v.* Davis, 17 Pick., 169.

But these cases all agree in this, that the judgment is not binding, certainly in the absence of an adequate remedy, against the sheriff or the attorney who wrongfully appeared, and differ only as to what the remedy is; to that effect see Freeman on Judgments, s. 98, where many cases are collected.

It comes, therefore, to this: Whatever service other than personal service has been heretofore allowed, a judgment rendered in the absence of the defendant so served has never been held to be final—that is, not subject to be directly reviewed or collaterally attacked—but it has always been held that a defendant is entitled to escape from such a judgment in some way, either by a proceeding instituted directly to vacate it or by attacking it collaterally when it is sought to be enforced against him. In other words, it has always been held that he shall have an opportunity to be heard after the judgment on the merits of the original claim, if he did not in fact have an opportunity to be heard before the judgment was rendered.

The state of the common law in this connection at the time when the first settlers came to this country confirms this conclusion. At that time no such thing was known as a judgment against a defendant before he entered an appearance in court, even if he had been personally served with process. Salem *v.* Eastern Railroad, 98 Mass., 431, 451; James *v.* Townsend, 104 Mass., 367, 372; Storey, J., in Picquet *v.* Swan, 5 Mason, 35, 48. At common law, if the defendant failed to obey the summons served on him, whether by personal service or by service at his house, or in real actions by posting notice on his land, the plaintiff's remedy was, where the injury was not accompanied by force, to take out a writ of *distringas*, or writs of judgment or *pone*, followed by writs of *distringas*, under which the property of the defendant was distrained to compel his appearance in court, and when all his property had been distrained for that purpose the power of the court was exhausted; in those cases where the injury was accompanied by force the remedy of the plaintiff was to take out a capias under which the defendant might be arrested; and if he secreted himself so that he could not be taken a series of writs could be taken out which resulted in his being declared an outlaw, at which point the power of the court was at an end. 3 Bl. Com., 279, 287. 143 & 144 It was not until 1725 and by force of St. 12, George 1, c. 29, that judgment at law could be taken by default for non-appearance of the defendant; it is of interest to note that personal service of the writ was required by St. 12, Geo. I, c. 29, to enable the plaintiff to take judgment by default.

It appears that at that time courts of equity did enter a decree taking the bill *pro confesso;* but this was done only if the service of the subpœna had been made on the defendant personally, and had been followed by successive processes of contempt, including sequestration. 3 Bl. Com., 444. It was not until 1732 and by force of St. 5, Geo. II, c. 25, that a decree taking the bill *pro confesso* could

entered unless the subpœna had been personally served, and then only on proof that the defendant had absconded to avoid service.

The principle that a defendant has the right to be heard on review of a judgment, if he did not have notice of the proceedings before judgment, is nothing more than the application to judgments rendered on a default based on service not personal of the fundamental doctrine of the common law, which obtains in England as well as in America, that no judgment can be rendered affecting another's rights of person or property without giving to that other an opportunity to be heard. "It is an essential principle of natural justice that every man have an opportunity to be heard in a court of law upon every question involving his rights or interests before he is affected by any judicial decision of the question." Commonwealth *v.* Cambridge, 4 Mass., 145 & 146 27. To the same effect see Wells, J., in Salem *v.* Eastern Railroad, 98 Mass., 447, 450; Devens, J., in Shores *v.* Hooper, 153 Mass., 228, 230, 231. "In our courts of law you cannot obtain a judgment against a party without entering an appearance for him, so that it shall seem as if he had appeared. He either does actually appear or else you enter an appearance for him, according to the act of Parliament expressly made for that purpose, and made because it is considered an invariable maxim of law that you cannot proceed against a party without his having the opportunity to be heard and without his appearing in court before a judgment shall be pronounced against him." Bayley, J., in Capel *v.* Child, 2 Cr. & Jerv., 558, 579. See to the same effect Parke, B., in Bonaher *v.* Evans, 16 Q. B., 162, 171, 172, where many authorities are cited.

In the light of the well-established general principle that no judgment can be rendered against a man until he has in fact had an opportunity to be heard and the equally well-established application of that general principle that a defendant has the right to be heard in review of a judgment rendered under a statute authorizing judgment against him to be entered in his absence, if he did not in fact have notice of the proceedings before judgment, which principle has obtained since the first statute authorizing service of process at the last and usual place of abode of the defendant, and was a component part of that act, and which has been universally observed since then, the constitutional provisions in question must be construed to guarantee to every citizen the right to be heard before judgment against him becomes irrevocable, and if the judgment on default is based on any service of process other than personal service on the defendant provision must be made giving to a defendant who did not in fact have notice of the proceeding before judgment an opportunity afterwards to have it reversed or to attack it collaterally when it is set up against him. This act does not secure to those named in the application and notice as claiming adverse interests their constitutional right to be heard, and is, in my opinion, for that reason, unconstitutional and void. 147 & 148

But if personal service upon those named as defendants in the application and notice had been required, the act would have been

unconstitutional and void because it undertakes to conclude thos having an adverse interest, whether residents or non-residents, wh are alleged not to be known to the applicant or the examiner, witi out making them parties defendant by name. The act provides tha though they be not named in the application or in the notice, the are made parties defendant by the insertion in the notice of th words "To all whom it may concern," and their rights are extin guished by their non-appearance in answer to that notice.

It is a principle of our jurisprudence brought to this country b our ancestors and recognized here since then that no person i barred by judgment or decree in judicial proceedings according t the course of the common law, in which the plaintiff asserts right of property adverse to his, unless he is named as a party defendant

I have already shown that every defendant named must hav notice of the proceeding before he can be finally and irrevocabl concluded thereby. The complement of that rule which, togethe with it, makes up the full measure of the vested rights of property in this connection guaranteed to each citizen by the constitution is the rule now under consideration, that no person is barred by judgment or decree in a proceeding the effect of which is to stri him of vested rights of property, unless he is named as a defendant

No principle could be introduced more dangerous to vested right of property than the principle that this rule can be dispensed with in the discretion of the legislature. If this rule is dispensed with no sufficient incentive is left to the plaintiff to name a 149 & 150 parties defendant those who have adverse interests— that is to say, those whose interests, if they are brough in, will lead them to do all in their power to defeat the object whic the plaintiff seeks to obtain by bringing his suit. The only poss ble way of insuring to those having adverse interests an opportu nity to be heard is to require the plaintiff to name them as defend ants under the penalty of their not being barred if not so named If this penalty is removed and a defendant is equally bound whether named or not, there is not only no incentive to name a defendants those who claim an adverse interest, but the law ha thereby offered to the plaintiff the greatest temptation not to nam an adverse claimant, if known, and not to use any diligence wha ever to discover whether there are in fact persons who claim an in terest adverse to his.

The effect of a judgment on a writ of right and of a fine, men tioned in the opinion, are not instances conflicting with the unive sality of the proposition that no person not named therein can l barred by a judicial proceeding. In those cases the world w barred, including all claiming an adverse interest, though not name in the proceeding. But that was the effect of the lapse of the ye and the day. They were not barred by the judgment apart fro the lapse of time, they were barred by the lapse of time after judgment. In other words, the judgment was sufficient to start t running of time against them, and they are barred by the operati of the principle of the statute of limitations.

The reference made in the opinion of the majority of the cou

to the statute of limitations makes it necessary to state in passing that the registration act cannot be supported on the grounds on which the statute of limitations quiets titles against all the world or on any grounds deducible therefrom. It is unquestionably within the constitutional power of the legislature to quiet the title to property by a statute of limitations. The principle of such a statute is that one who is dispossessed of his property must assert his ownership thereto by action within a specified time or be barred thereof—that is to say, cease to be such owner. But no
151 & 152 statute was ever passed providing that an owner in possession of his property could be dispossessed thereof by any lapse of time, and no principle is deducible from the statute of limitations which can justify such a statute or a statute providing that, without naming him as a defendant or without giving him notice, a court can by decree alone, unaided by the subsequent lapse of time, transfer his property to another.

But the main ground on which this provision of the act is sought to be upheld is that of necessity. It is said "if it does not satisfy the Constitution a judicial proceeding to clear titles against all the world is hardly possible, for the very meaning of such a proceeding is to get rid of unknown as well as known claims—indeed, certainty against the unknown may be said to be its chief end—and unknown claims cannot be dealt with by personal service upon the claimants." It is undoubtedly true that the chief end of a proceeding to clear titles is to get rid of the unknown, and that an unknown claim cannot be dealt with by bringing notice of the proceeding home to the claimant, and it is true that it follows from that that a title cannot be cleared by a judicial proceeding unaided by the lapse of time, but it does not follow that titles cannot be cleared. The lapse of time has been the means and the only means heretofore used under our jurisprudence to clear titles against unknown claimants. Under our Constitution it is, in my opinion, the only means available therefor, but it is of importance that it is available, and therefore that the argument of necessity fails. It would be within the constitutional power of the legislature to enact that the effect of some such decree as is provided for in this act, when properly proclaimed and served, should have the effect to put the claimant in possession of the title so set up, and that, if that possession continued unbroken and the decree setting up the applicant's title remained in force unmodified for a specified time, all the world should be barred. If the opinion of the supreme court of Illinois in this connection (People *v.* Simon, 176 Ill., 165, 177, 178) is not to be con-
153 & 154 strued as confined to the particular provisions of that act, it cannot be supported.

Such a requirement would practically enable any person to protect his rights of property by an examination of the records of the court of registration made during the specified term, while under this act it is beyond the power of a person to protect his property from the effect of a decree not subject to be reopened and made in his absence without his knowledge. If he have an estate less than the fee, he can protect himself neither by registering his

own title nor by an inspection of the records of the court. He can do nothing but trust to the chance that the applicant and the examiner may exercise sufficient care to discover his claim, will learn his true name and address, and that if his claim is discovered and the notice is properly addressed and mailed it will reach him in time to enable him to appear in court before a decree has been rendered in his absence, which is beyond the power of any court to change when once it has been made; and if his original title is by prescription, he must trust to the intelligence and good faith of the applicant alone, for the examiner will not in his examination learn of such a title.

But there is an even more decisive answer to the argument of necessity, and that is this: The constitutional provision securing to the owner the right not to be deprived of his property except by due process of law speaks to each citizen directly and personally. It is no answer when a person complains that he had no notice of the proceeding in which the decree was made transferring his property to another to say to him that ninety-nine other persons had notice, and that in ninety-nine cases out of a hundred a person would have notice. This provision is not a glittering generality to be explained away in any such manner to a man whose property has been divested by a decree made in his absence. It is a constitutional guarantee to each citizen, and no citizen can be deprived of the security given by the Constitution to his rights of property for any counterbalancing of the benefits derived by the multitude against the evil suffered by him; it is a constitutional guarantee to each citizen that his property shall not be transferred by the judgment of a court to another without his having had in fact an opportunity to be heard, no matter what the consequences may be. If it means anything short of that, it is not a constitutional guarantee; it is but a rule which may mean something or nothing, as the legislature in its discretion may decide.

155 & 156

Moreover, this is a constitutional guarantee made to each and every citizen equally and alike. It is no fault of a person residing in the Commonwealth, who has an estate in the land covered by the application, that the applicant and the examiner did not know of his claim if they did not know of it; much less if they allege that they did not know of it when by the exercise of due care they would have known of it.

It is strange, indeed, if a discrimination can be made between two residents within the Commonwealth as to their constitutional right to be heard before an irrevocable judgment is made concluding their rights of property, and that that discrimination should finally depend on the negligence and good faith of their opponent, the applicant, and of the court examiner, and, as has been shown in case of titles by prescription, on that of the applicant alone; and yet that is the conclusion to which the court has come; by the opinion of the court the negligence of the applicant in not discovering the claim of a resident to an interest in the land in question precludes him from having the same right to be heard in defence

his rights of property in that land which his neighbor has, whose
im was discovered; in the first case he is not named as a
fendant, and that service of process which is required in actions
personam need not be made on him; in the latter case the de-
ndant is not barred unless such service of process as is required
actions *in personam* has been made.

There is no precedent for holding that the rights of persons not
med as defendants are barred in any proceeding other than a
proceeding *in rem*, and for the reasons which I have
7 & 158 given I am of opinion that the constitutional rights of
property guaranteed to each and every citizen equally
d alike require that that rule should not be abrogated.

To conclude this part of the discussion, I am of opinion that un-
ss the proceeding under the registration act is to be supported as
proceeding *in rem*, it is without precedent and is contrary to the
le heretofore universally recognized without any exception wher-
er the common law of England prevails, that no party is barred
nless he in fact had an opportunity to be heard—Commonwealth
Cambridge, 4 Mass., 627; Salem *v.* Eastern Railroad, 98 Mass., 431;
nores *v.* Hooper, 153 Mass., 228, 230; Capel *v.* Child, 2 Cro. & Jerv.
58; Bonaker *v.* Evans, 16 Q. B., 162—and I am of opinion that
nless the application is a proceeding *in rem*) a decree under that
t, so far as it affects either the rights of absent defendants named
nd not personally served or absent persons not named, is not due
rocess of law.

I come now to the consideration of the constitutionality of the
t as a proceeding *in rem*.

The act professes to be drawn on the theory that it authorizes a
roceeding *in rem*, and it is plain that the service of the notice pre-
ribed was taken from that used in proceedings in the probate
ourts; it is also plain that there was no attempt to secure a com-
iance with the requirements of an action *in personam*, either with
spect to the service to be made upon those named as defendants
to the necessity of joining as parties defendant all whom the
laintiff wished to have concluded by the decree.

Petitions for probate of a will afford no ground for holding that
e application under the act is a proceeding *in rem*. Where there
a fund in court for distribution, such as the proceeds of a bank-
upt estate or of the property of an insolvent corporation which is in
rocess of being wound up, a general notice to whom it may con-
rn served by publication is sufficient to give the court jurisdiction,
nd it is sufficient because in such cases the object of the proceeding
not to divest an owner of a title which he has, but to entitle him
to share in the fund by proving his right; petitions for
59 & 160 the probate of a will (Bonnemort *v.* Gill, 167 Mass., 338)
and inquests of office to establish an escheat (Hamilton
Brown, 161 U. S., 256) belong to this class. No rights of property
uaranteed by the Constitution have vested in the heir which the
robate of the will or the inquest of office divests; the purpose of
uch proceedings is to ascertain whether such rights shall or shall
ot vest in the heir. Hamilton *v.* Brown, 161 U. S., 256, 268.

More than that, it has never been decided that a decree admitting a will to probate was binding on all the world or that a statute could be constitutionally passed making it binding on all the world. In Bonnemort *v.* Gill, 167 Mass., 338, the only point decided was that notice by publication gave the court jurisdiction to proceed with the petition for probate of the will, but it is perfectly well settled that the decree of the probate court in that proceeding can be vacated on application at any time. Waters *v.* Stickney, 12 Allen, 1; Gale *v.* Nickerson, 144 Mass., 415. In Hamilton *v.* Brown, 161 U. S., 256, it was decided that a statute of Texas was not in violation of the fourteenth amendment which made the decree of escheat therein provided for binding on all the world after notice similar to that provided for by the registration act under discussion. This statute did not go as far as the registration act; the statute directed that the land covered by the decree of escheat should be sold and provided that the proceeds of the sale should be paid to any person who should subsequently prove himself to be the heir. Pasch. Dig., art. 3671; Hamilton *v.* Brown, 161 U. S., 256, 264. That fact was mentioned in the opinion, but does not seem to have been relied upon. The opinion lays down the broad proposition that the decree of escheat is conclusive on the ground that "if such proceedings are had after actual notice by service of summons to all known claimants and constructive notice by publication to all possible claimants who are unknown the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the State, as by inquest of
161 & 162 office or similar process to determine whether the estate has escheated to the public, is due to process of law." Hamilton *v.* Brown, 161 U. S., 256, 275. So far as that reasoning goes, the case is open to the criticism (first) that the right of succession among private persons in the ordinary administration of estates is not finally determined by a decree of the probate court; such a decree can be vacated at any time—Waters *v.* Stickney, 12 Allen, 1; Gale *v.* Nickerson, 144 Mass., 415—and (second) that the right of succession as between all persons and the State is not finally determined by an inquest of office. Office found in favor of the King did not result in a judgment binding on all the world; it merely entitled him to the possession of the *res;* it did not determine as against the world his or anybody's right of property in the *res*—3 Bl. Com., 259, 260—but the true owner could "avoid the possession of the Crown acquired by the finding of such an office" by petition of right disclosing new facts not found by the office or by his *monstrans de droit*, relying on the facts as found or by traversing the facts found in favor of the King on leave obtained from the court of chancery under its common-law jurisdiction and from the petty bag (Stuart, V. C., in *In re* Parry, L. R., 2 Eq., 95, 97; 3 Bl. Com., 258; *Ex parte* Webster, 6 Ves., 809; *Ex parte* Gwydir, 4 Maddock, 281; 16 Vin. Abr., 86, pl. 1).

Blackstone's qualification (3 Bl. Com., 260) that an owner has "for the most part" a right to traverse facts is inaccurate, and it is true, as

have stated, that the owner has the right in every case to traverse
he facts found by the inquisition. It appears from an inspection
f Sir Henry Finch's Discourse on Law, p. 324, which Blackstone
ites for the qualification, that if the office was found for the King
n a judgment of another court, whereby the owner was attainted
f treason, he could not attack that judgment collaterally in a trav-
rse to the inquisition; that in no way qualifies the right of a
erson to traverse the facts established by office found alone. So
ar, therefore, as the decision in Hamiliton *v.* Brown rests on the
analogy of a final determination of the right of succes-
63 & 164 sion among private persons or between all persons and
the State it cannot be supported.

But the decision was also put on the further ground that "when a
nan dies the legislature is under no constitutional obligation to
eave the title to his property, real or personal, in abeyance for an
ndefinite time." This statement in the opinion, taken in connection
vith the provision of the statute that the petition to have the escheat
stablished could only be filed "when no letters testamentary or of
dministration appear to have been granted" in the county where
his estate would be administered—Pasch. Dig., art. 3658; Hamilton
. Brown, 161 U. S., 338, 265—puts the case on the same footing as
fund in court, especially when it was stated in an earlier part of the
pinion that "the whole object in proceedings for escheat or in pro-
ceedings of administration is to ascertain who are entitled to the
state of a deceased person." Hamilton *v.* Brown, 161 U.S., 338, 368.
When one dies seized of land and no administration is taken out on
his estate, it is plain that his estate is in the same position as a fund
n court. The estate must be handed over to somebody. A general
notice to all to come in and prove their right is sufficient, especially
as the only practical effect is to change the land into money, it being
expressly provided that any one entitled to the land shall be entitled
on application to the proceeds derived by the State from the sale
thereof. Anything short of that might well result in large tracts of
land in such a State as Texas remaining vacant to the detriment of
the public welfare. In the petition for escheat in Hamilton *v.* Brown
it is alleged that on the death of Hamilton, who died seized, "there
are no tenants upon said tract of land and no person is in actual
or constructive possession of said tract of land or any part thereof,
nor is there any person claiming the estate in and to said tract of
land known to the petitioner." Hamilton *v.* Brown, 161 U. S., 338,
358. There is nothing, therefore, in petitions for probate of a will
or to establish an escheat which justifies the application under this
act as a proceeding *in rem*.

165 & 166 The analogy of a libel *in rem* in admiralty is the
analogy which has been most pressed as justifying this
as a proceeding *in rem*, and the general proposition is laid down
that if all the world are barred the proceeding is a proceeding
in rem.

But the test whether particular proceedings are or are not pro-
ceedings *in rem* depends upon whether they "are proceedings
against property alone treated as responsible for the claims asserted

by the libellants or plaintiffs. The property itself is, in such actions, the defendant, and, except in cases arising during war for its hostile character, its forfeiture or sale is sought for the wrong in the commission of which it has been the instrument or for debts or obligations for which by operation of law it is liable." Field, J., in Freeman *v.* Alderson, 119 U. S., 165, 187; to the same effect see Miller, J., in Hine *v.* Trevor, 4 Wall., 555, 571.

That this is the true test of whether a particular proceeding is or is not a proceeding *in rem* is shown by the admiralty rule as to possessory and petitory libels. If the purpose of the libel is the ascertainment of title or delivery of possession of a ship, or if the libel is filed to obtain security for the return of the ship from a voyage undertaken without the consent of the libellant, being a part owner, a libel *in rem* does not lie; the libellant must make the owner a party and make service upon him as in an action *in personam* at law. Benedict's Admiralty Practice, s. 395; Henry, Admiralty Jurisdiction and Procedure, s. 29. There is therefore no authority to be found in admiralty for a proceeding *in rem* where the purpose of the proceeding is the ascertainment and establishment of the plaintiff's title in the *res*.

Whether a particular proceeding is or is not a proceeding *in rem* depends upon the character of the right in the *res* sought to be enforced, which is given by rules of substantive law, when the purpose of the proceeding is to enforce a right of property and not to find an owner for property *in custodia legis*, as in case of a
167 & 168 fund in court, the probate of a will, or an escheat for lack of heirs. It does not depend upon the fact that the plaintiff undertakes to enforce an ordinary right of property in the *res* against all the world; the test is not, Are all the world barred? but it is, Is it a proceeding to enforce a liability for which the *res* is liable, irrespective of who owns it, such a liability that the *res* can be properly impleaded as the respondent, who is liable? If it is, then a proceeding *in rem* lies, and all the world are barred; but if it is not such a proceeding, and is a proceeding to enforce an ordinary right of lien or of property only, the proceeding is not in its nature a proceeding *in rem*, and the legislature cannot make it so by providing that all the world shall be barred. To say that the test of a proceeding *in rem* is the fact that all the world are barred is to confuse cause and effect.

The only proceeding *in rem* known to the common law was an inquest of office, already referred to in connection with Hamilton *v.* Brown, 161 U. S., 256, "which is an inquiry made * * * concerning any matter that entitles the King to the possession of lands or tenements, goods or chattels"—3 Bl. Com., 258—such as an attainder for treason, whereby the guilty party's property was forfeited to the King, or dying without heirs, whereby his lands escheated to the King. It also was the proper remedy to give the King possession of chattels, as in case of wreck, treasure trove, and the like, and forfeitures for offences, as, for example, the forfeiture of the property of a *felo de se*. 3 Bl. Com. 258, 259.

Forfeiture of lands was, by the Body of Liberties of 1641, declared

not to exist in the colony of Massachusetts (Commonwealth *v.* Mink, 123 Mass., 422, 425, 426), and most of the other prerogatives of the King mentioned by Blackstone never obtained here; but the principle of such inquests has been followed in case of forfeitures for offences, and there are several instances where the legislature has declared that personal property should be forfeited if used illegally, and in such cases has properly provided for a pro-
169&170 ceeding *in rem* against it. Familiar examples of this are to be found in Pub. Sts., c. 212, and in Pub. Sts., c. 100, ss. 30–39, providing that certain personal property used in violation of law, including implements used in gaming and liquor kept for sale in violation of the statute, should be liable to be condemned; and many cases of proceedings *in rem* under those acts are to be found in the reports. A very instructive opinion in this connection by the present chief justice is to be found in Commonwealth *v.* Intoxicating Liquors, 163 Mass., 42; see also Attorney General *v.* Municipal Court, 103 Mass., 456; Commonwealth *v.* Gaming Implements, 119 Mass., 332.

Where the purpose of the proceeding is neither to find an owner for property *in custodia legis* nor to enforce a right of such a nature that the *res* itself is properly impleaded as the responsible defendant, but the purpose of the proceeding is to deal with some one's right of property therein, as in case of a possessory or petitory libel in admiralty, the action is not an action *in rem*, but an action *in personam* (Field, J., in Freeman *v.* Alderson, 119 U. S., 185, at pp. 187, 188, and at p. 190), and all parties to be concluded thereby must be named as parties defendant.

In stating that the test and the only test as to whether a particular proceeding is or is not a proceeding *in rem* is this, "Are all the world barred?" the chief justice tacitly recognizes that if this proceeding is upheld as a proceeding *in rem* it is within the constitutional power of the legislature to provide that any property within the territorial limits of the Commonwealth, real or personal, corporeal or incorporeal, may be recovered, or any titles therein or lien thereto established in a proceeding in which no defendant need be named and no notice need be given except notice by publication. If in this proceeding the legislature can change the constitutional right to be heard by authorizing a proceeding *in rem* it may authorize a proceeding *in rem* in any case involving property, and upon its doing so all the rest follows. There is no escape from that conclusion. There is nothing peculiar to this proceed-
171&172 ing. It is a proceeding which may be maintained by any person whether in or out of possession of land to establish the title which he claims thereto.

For the purposes of decision the choice lies between the view which I have set forth on the one hand and on the other hand holding the doctrine that it is within the constitutional power of the legislature by changing the form of the proceeding from an action *in personam* to an action *in rem* to avoid the necessity of complying with the requirements of an action *in personam* in those cases in which, under the constitutional requirements of due pro-

cess of law, it has heretofore been necessary to name as parties defendant all persons who are to be concluded by the judgment or decree, and to give to them actual notice of the pending proceeding and an opportunity to be heard before a judgment, which is final and is not subject to be reviewed or attacked, can be rendered against them.

I will now consider the authorities and points principally relied on by the attorney general which I have not yet disposed of. The attorney general seems to place his main reliance (first) on the statutes as to partition and the cases of Cook *v.* Allen, 2 Mass., 470; Dascomb *v.* Davis, 5 Met., 335, and Foster *v.* Abbott, 8 Met., 586, which have arisen in Massachusetts under them, and (second) on the three cases of Belcher *v.* Mhoon, 47 Miss., 613; Sullivant *v.* Weaver, 10 Ohio, 276, and Shepherd *v.* Ware, 46 Minn., 174.

There is nothing in the statutes as to partition or in the cases arising under them to conflict with the conclusion to which I have come.

It will not be necessary to consider the statutes prior to the Revised Statutes. Prov. Laws, 1742–'3, c. 24 (III Prov. Laws, p. 42); St. 1783, c. 41; St. 1786, c. 53. Prior to the Revised Statutes, the act did not undertake to deal with rights of property either finally or *prima facie;* it dealt only with the right of possession without regard to the right of an owner to enforce his right of property in a writ of right. Dascomb *v.* Davis, 5 Met., 335, 340; Cook *v.* Allen, 2 Mass., 470; Report of Commissioners on Revised Statutes, c. 103; note to s. 30. By reason of the abolition
173 & 174 in the Revised Statutes of the writ of right, the judgment on a petition for partition became equivalent to a judgment on a writ of entry, and it became necessary to protect the rights of property of those who were parties to the partition proceedings, whether they appeared or not, and the provisions which were enacted in Rev. Sts., c. 103, ss. 33–47, were drafted by the commissioners for that purpose. It was provided that if two persons claimed to be entitled to a particular share, the court admitted one of them to act for that share in respect to the partition, and the assignment of land to that share was binding upon the owner thereof, whoever he might be—Rev. Sts., c. 103, s. 41—but he was not concluded as to the ownership of the share so assigned—Rev. Sts., c. 103, ss. 40, 41, 42—and if one claiming to be the owner of a share did not appear in the partition proceedings, he was bound by the assignment of land made to the share claimed by him, but could recover the land so assigned in a suit brought for that purpose. Rev. Sts., c. 103, ss. 39, 40. If one who did not appear claimed to be part owner with another of a share which was assigned to that other, he was bound by the assignment of land to the share, but could recover his part of the land so assigned. S. 43. If one who did not appear claimed to own in severalty any part of the land divided, he was not bound by the partition proceedings, but could recover his land as if no partition proceedings had been had. Rev. Sts., c. 103, s. 38. If any person to whom land had been assigned was evicted, he could have a partition of the residue of the

original land—s. 46—and, finally, if any part owner at the time of the partition was out of the State he was not bound by the partition made, but could within three years after final judgment have a new partition—ss. 34, 35, 36—and full right of review by appeal, and a writ of error could be had to any judgment. Rev. Sts., c. 103, ss. 31, 32; Foster *v.* Abbott, 8 Met., 596, 599. As to the scope of the act, see Commissioner's Report, Revised Statutes, c. 103, notes to ss. 36–40, ss. 40, 41, 42, 43, and Pub. Sts., c. 178, ss. 35–44.

175&176 Neither Belcher *v.* Mhoon, 47 Miss., 613, nor Sullivant *v.* Weaver, 10 Ohio, 276, are cases of much original importance, and in each State there are subsequent decisions under which the land registration act under discussion is unconstitutional. Brown *v.* Levee Commissioners, 50 Miss., 468; State *v.* Guilbert, 56 Ohio St., 575.

In Belcher *v.* Mhoon, 47 Miss., 613, the question of the constitutionality of the act was neither raised by counsel nor passed upon by the court. From the obscure report of Sullivant *v.* Weaver, 10 Ohio, 276, it woul dseem to have been held in that case that a decree in equity founded on process issued against the heirs of a specified decedent was evidence in proving a chain of title. The sole question in the case was whether the plaintiff had made out a *prima facie* case of title in himself. The constitutional question under discussion was not raised. It was objected in argument that the decree could not be collaterally attacked, and there was no suggestion that the defendant was an heir of the decedent.

Shepherd *v.* Ware, 46 Minn., 174, is an authority for the constitutionality of an act providing that in an action to quiet title unknown persons are bound by a notice to all the world, served by publication; but even that decision is no authority for this act. In that case any interested party had a year after judgment to appear and have it vacated. It is expressly stated in the opinion that the statute gave to such unnamed persons "the same right to appear and defend before and after judgment" that was given to named defendants who were served by publication, and it appears by Statutes of Minnesota 1894, s. 5206, that a defendant brought in by publication could within one year after judgment appear and have the judgment vacated if it was wrongly made. For reasons already given I think that opinion, though it does not go so far as this act, goes too far.

The doctrine of Arndt *v.* Griggs, 134 U. S., 316, and Short *v.* Caldwell, 155 Mass., 57, does not reach the question under discussion.

177&178 No State is deprived of its power to deal with property within its limits by the absence of the owner; consequently it is within the power of a State, in case a suit is brought against the non-resident in which the plaintiff seeks to affect the estate of the defendant, but not to entitle himself to a personal charge against the defendant, to proceed against his estate after giving him such notice as the circumstances permit. See Miller, J., in Huling *v.* Kaw Valley Railroad, 130 U. S., 316, 320, 321. But if a title to real estate can be established against unknown claimants in a proceeding in which they are not named

and where service is made by publication only, it must be ported on a principle which is different in kind from the doct of those cases.

It is true that several statutes have been enacted of recent y which undertake to conclude unknown and unnamed defend St. 1882, c. 237; St. 1885, c. 283; St. 1889, c. 442; St. 1893, c. 34(1897, c. 522. The constitutionality of these acts in the counc now under discussion has never been brought before the court. Short *v.* Caldwell, 155 Mass., 57, the only objection raised was lack of jurisdiction by reason of the non-residence of the claim who appeared. In Loring *v.* Hildreth, 170 Mass., 328, the only stitutional objection set up was that constructive service ca reach unborn parties represented in fact by a guardian *ad litem* was conceded in argument that there might be constructive se or unknown persons (p. 329), and that was not considered b court. How far these statutes are void is not now before the c Whether effect can be given to a decree under St. 1889, c. 442 St. 1897, c. 522, when unascertained parties are before the cou a guardian (as in Loring *v.* Hildreth, *ubi supra*), or a decree ag unnamed parties under St. 1897, c. 373, can be supported as l against members of a class sufficiently represented in court, not now be considered.

The conclusion which I have reached is in the main support Webster *v.* Reed, 11 How., 437; State *v.* Guilbert, 56 Ohio St., Brown *v.* Levee Commissioners, 50 Miss., 46; People *v.* Simon Ill., 165.

In the words of Chief Justice Coke: "When authority and cedent is wanting there is need of great consideration l
179 anything of novelty shall be established, and to provide this be not against the law of the land." 12 Rep., 75.

I am authorized to state that Mr. Justice Lathrop concurs in opinion.

180 [Endorsed:] Tyler *vs.* Judges Ct. of Registration. Cer copy of the opinion of the supreme judicial court.

181 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the judges of the co registration established at Boston, in the Commonwealth of M chusetts, Greeting:

You are hereby cited and admonished to be and appear i Supreme Court of the United States, in the city of Washingt the * twelfth day of March next, pursuant to a writ of error fi the clerk's office of the † supreme judicial court of Massachuse the county of Suffolk, wherein William B. Tyler, of Peabody, i county of Essex, in the said Commonwealth, is plaintiff in erro you are defendants in error, to show cause, if any there be, wh

judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Oliver Wendell Holmes, chief justice of the supreme judicial court of Massachusetts, this twelfth day of February, in the year of our Lord one thousand and nine hundred.

OLIVER WENDELL HOLMES,
Chief Justice of the Supreme Judicial Court.

---

* Not exceeding 30 days from the day of signing.
† Name of court to which writ of error is directed.

182 Due service of the within citation on the defendants in error is hereby acknowledged.

HOSEA M. KNOWLTON,
Attorney General.

183 & 184 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

Supreme Judicial Court.

I, John Noble, clerk of the supreme judicial court within and for the said county of Suffolk, hereby certify that the foregoing are true copies of—

I. The record in the case of William B. Tyler, petitioner for writ of prohibition, *v.* The Judges of the Court of Registration, respondents, in said supreme judicial court determined, and annexed to and transmitted with said record; of—

II. The assignment of errors.

III. The reservation and report to the full court made by the justice presiding at the hearing.

185 IV. The opinions of the full court; and of all the proceedings in said case, with all things concerning the same, together with—

V. The original citation.

VI. The acknowledgment of service thereon.

In witness whereof I have hereunto set my hand and affixed the seal of said court this twentieth day of February, in the year of our Lord one thousand nine hundred.

[SEAL.] JOHN NOBLE, *Clerk.*

186 In the Supreme Court of the United States.

WILLIAM B. TYLER, Pl'f in Error,
v.
THE JUDGES OF THE COURT OF REGISTRATION, Def'ts in Error.

It is agreed that the plans contained in the transcript of the record be not printed.

J. L. THORNDIKE,
For Pl'ff in Error.
HOSEA M. KNOWLTON,
Att'y Gen'l Mass., for Defendants.

187 [Endorsed:] File No., 17656. Supreme Court U. S., October term, 1899. Term No., 542. Wm. B. Tyler, P. E., vs. The Judges of the Court of Registration. Stipulation to omit part of record in printing. Filed Feb. 27, 1900.

Endorsed on cover: File No., 17656. Massachusetts supreme judicial court. Term No., 542. William B. Tyler, plaintiff in error, *vs.* The Judges of the Court of Registration. Filed February 27th, 1900.

Supreme Court of the United States.

No. 542. October Term, 1899.

William B. Tyler, Plaintiff in Error,

v.

The Judges of the Court of Registration.

Motion to Advance.

The Judges of the Court of Registration, the defendants in error, move that this cause be advanced upon the docket of the court for hearing and argument at an early day to be appointed therefor after the beginning of the October term of 1900.

Brief Statement of the Case.

In 1898, by chapter 562 of the statutes of that year, known as the Land Registration Act, the Legislature of Massachusetts established as a part of the judicial department of the State a court of record, having jurisdiction throughout the entire Commonwealth, and known as the Court of Registration. The statute gave the court jurisdiction over all questions relating to the title to land within the State, with power, upon application by land owners and certain other persons interested and after appropriate judicial proceedings, to enter a decree conclusive upon all persons, declaring the title upon which such land, subject to certain specified rights, should be held. The statute further provided a system of conveying and dealing with land, the title of which had been thus judicially declared, embodying substantially the principles of the so-called Torrens system of registration and transfer of title to land.

The present case arises upon a petition for a writ of prohibition, brought to restrain the judges of the Court of Registration aforesaid from proceeding to hear and determine an application to such court made in accordance with the statute, praying for a decree declaring the title to certain land. The petitioner for the writ of prohibition alleges that the statute establishing the court is in violation of the Constitution of the United States in that it seeks to deprive persons of their property without due process of law, and that the Court of Registration is, therefore, no court at all and has no jurisdiction whatsoever. The full bench of the Supreme Judicial Court of Massachusetts, in a decision rendered January 3, 1900, decided that the statute was constitutional, and this writ of error is brought to review that judgment.

Reasons for Motion to Advance.

The following "special and peculiar circumstances" are here stated in accordance with Rule 26, paragraph 7.

First. — The question here raised involves a matter of great and general public interest and importance, in which the Commonwealth of Massachusetts in particular and several other states of the Union as well are concerned, and the case is, therefore, within the spirit if not within the letter of Rule 26, paragraph 5.

1. The question relates to the constitutionality of a statute of Massachusetts establishing a Court of Registration as a part of the judicial branch of the State government and conferring upon it a large and important jurisdiction, and this case attacks the legality of such court and of all its acts, past, present and future. The Land Registration Act went into effect on the first day of October, 1898. The judges being duly appointed and qualified in that month, at once proceeded to act upon petitions and to make decrees confirming titles to land and ordering them to be registered under the act, and they have since continued and are now continuing to exercise their authority in this manner. Since the establishment of the court, about 275 certificates of title have been issued covering land situated in seven of the fourteen counties of the State. There are now pending before the court about 50 cases. The question here raised

concerns the validity of all decrees and certificates of title heretofore issued and hereafter to be issued, the marketability of lands to which such certificates relate is adversely affected, and the rights of the owners and mortgagees of such lands, who are now quite numerous are left in doubt while this case remains undetermined.

2. It is against public interest that a court should continue hearing cases and rendering final judgments and decrees, if the law under which it is established be unconstitutional and all its acts, therefore, void and of no effect.

3. In the several states mentioned below and in the District of Columbia land registration acts, the constitutionality of which is involved in the determination of this case, are now under active consideration by legislatures and bar associations, and in at least two states (Illinois and California), land registration acts are already in operation.

(1) District of Columbia. A bill is now pending in Congress.

(2) Rhode Island. A commission appointed by the Legislature has the matter now under consideration.

(3) Montana. The matter was before the last Legislature and was continued to await the decision in this case.

(4) Missouri. A bill was before the Legislature in 1899.

(5) Virginia. A committee of the Bar Association was appointed in 1899 to report a bill.

(6) Alabama. Legislation was recommended by the Bar Association in 1899.

(7) Tennessee. A bill was drawn in 1898 and recommended by the Bar Association.

(8) Texas. Legislation was recommended by the Bar Association in 1897, 1898 and 1899.

Second. — The pendency of this case, the fact of which has been widely published and is generally known throughout the state, operates materially to suspend the carrying out of the provisions of the statute and the exercise of the powers conferred upon the Court of Registration, hampers the entire system of land registration established by the Massachusetts Legislature and embarrasses the operation of an important part of the judicial branch of the state government. Many land owners who wish to avail them-

selves of the provisions of the Land Registration Act are deterred from doing so while this case is pending, and since the court has no power to act except upon application, the amount of business done by the court is much less than it would be if the question should be finally set at rest by a decision of this court upholding the statute.

Third. — The case is within the spirit of Rule 32, the only question in issue being the question of the jurisdiction of the court below. The reason for the rule, the reason for the similar provisions of chapter 236 of the Acts of Congress of 1889, and the reason for clause 1 of section 5 of chapter 517 of the Acts of 1891, fully cover this case. It is intended that questions as to the jurisdiction of a court should be heard and determined by the court of last resort with the shortest possible delay. It is against public interest that the final decrees or judgments of a court on questions of jurisdiction should remain open to question longer than necessary.

HOSEA M. KNOWLTON,

Attorney-General of the Commonwealth of Massachusetts.

The plaintiff in error assents to the allowance of the above motion.

By his counsel,

J. L. THORNDIKE.

2356

No. 213.

Brf. of Thorndike for P. E.

(17,656)

Office Supreme Court U.S.
FILED
OCT 12 1900
JAMES H. McKENNEY,
Clerk

Filed Oct. 12, 1900.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1900

No. 213

WILLIAM B. TYLER . . . PLAINTIFF IN ERROR

v.

THE JUDGES OF THE COURT OF REGISTRATION . . . . DEFENDANTS IN ERROR

IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE PLAINTIFF IN ERROR

J. L. THORNDIKE
Counsel

INDEX

		PAGE
Statement of the Case		1
Errors Assigned		6
1.	*First Objection*, Conclusive Effect of Original Registration, As to Residents not served with Notice	7
	Nature of Proceedings	8
	Insufficiency of Notice by Advertisement	10
	Substituted Service on Absent and Unknown Parties	11
	Fundamental Rights	12
	Decisions as to Requirement of Notice	13–20
	Grounds of Decision of the Court below	21
	Examination of Title by the official Examiner	23
	Power of States to prescribe what shall be Due Process	25
	Supposed Difficulty of clearing Titles	25
2.	As to Non-Residents not named or described in the published Notice	28
3.	As to Persons not in being for whom no Protection is provided,	29
4.	Notice not dispensed with on the Ground that the Proceedings are *in Rem*	30
	Seizure, and not Advertisement, the effective Notice in Suits *in Rem*	31–36
	Declarations in the Act as to Nature of the Proceedings	37
	Grounds of the Opinion of Holmes, C.J.	40
	Austin's Doctrine that all Rights of Action are Rights against *determinate* Persons	42
	"Judgments *in Rem*" in Proceedings that are not *in Rem*,	44
	Status	45
	Probate and Administration	47
	Escheats	48
	Writs of Right and Fines	49
	Statutes of Limitation	51
	What Notice is relied on if Proceedings are *in Rem*	52
5.	Power of States to dispense with Notice by Change from Suit *in Personam* to Suit *in Rem*	52
	Notice in Admiralty	56
6.	Other Statutes and Cases alleged to be similar in Principle	57
7.	*Second Objection*, Conclusive Effect of Registration of subsequent Dealings	62
	Tenure	66
	Reasons of the Majority of the Court below	67
8.	Validity of the whole Act affected by each Objection	71
9.	Prohibition	72
APPENDIX,	The Land Registration Act	75

(17,656)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1900

No. 213

WILLIAM B. TYLER . . . PLAINTIFF IN ERROR

v.

THE JUDGES OF THE COURT OF REGISTRATION . . . . DEFENDANTS IN ERROR

IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE PLAINTIFF IN ERROR

This case was a petition by the Plaintiff in Error for a writ of prohibition to the Judges of the Court of Registration in Massachusetts to prohibit them from proceeding further in registering the title to a certain parcel of land and determining the boundaries between it and an adjoining piece of land belonging to the Plaintiff in Error.

The grounds of the petition were that the Massachusetts act of 1898, c. 562, called the Land Registration Act, under which the proceedings complained of were had, was contrary to the Constitution of the United States, as well as to that of Massachusetts, (1) in that it gave to decrees for the original registration of land the effect of depriving persons of their property without due process of law, and (2) in that it gave to the acts of the recorder and assistant

recorder in subsequent dealings with registered land a like effect; also that the act was otherwise contrary to the State Constitution; and that, these provisions of the act being essential parts of the system intended to be established by it, their invalidity rendered the whole act invalid.

The provisions of the act are set out in full in the Appendix, *post*, p. 75.

The purpose of the act is to obtain an absolute certainty as to the title acquired upon every transfer of registered land or any interest in it, and by this means to do away with the necessity of examining the title upon every transfer.

In order to effect this purpose the title of each applicant for registration is investigated in a judicial proceeding, with certain provisions for notice as hereinafter mentioned, and, if his title is found to be a good one, he is registered by a decree of court as the owner of the land. The decree conclusively quiets his title and excludes the claims of all other persons. After such registration a purchaser from the registered owner need not concern himself to look into the previous title, but may rely absolutely on the conclusive effect of the registration.

Subsequent transfers of the land are effected only by entries made by a recording officer in the register, with the actual or presumed assent of the registered owner. These entries have a like conclusive effect against the previously registered owner and all persons claiming under him, and a purchaser from any one that appears by such an entry to be the owner may rely absolutely on the entry in the register without further inquiry.

The examination of the title of a registered owner previous to the entry of his ownership on the register is by this means entirely done away with. In any dealings with the land it is only necessary to examine the entries, if any, that may have been made after he was registered as owner. His title cannot be incumbered or affected otherwise than by such entries, and all prior claims are excluded by the original registration and the subsequent entries.

While a purchaser of registered land thus obtains a title that cannot be questioned, he may be deprived of it without any fault of his

n, by a subsequent entry in the register procured by fraud or de by mistake of the recording officer. Persons thus deprived of y interest in land after its original registration are provided with mpensation out of an assurance fund. No such compensation is ovided for those that are deprived of any interest by the original gistration, as they are supposed to have an opportunity of assert- g their claims in the investigation that precedes that registration.

The manner prescribed by the act for obtaining the original regis- ation is by a judicial proceeding in the Court of Registration to uiet the title of the applicant.

His first step is filing an application to the court to have his title egistered and confirmed (ss. 20, 21), and upon filing it he is required o file also in the registry of deeds a memorandum stating the appli- ation and the date and place of filing and the description of the and (s. 20). The application is signed and sworn, and must con- ain, among other things, a description of the land, and the names nd addresses of the adjoining owners and occupants, if known, or a statement of what search has been made to find them; and the pre- scribed form of application contains a statement that the applicant does not know of any mortgage or encumbrance, or that any other person has any estate or interest in the land other than such as are set out in the application (s. 21).

Upon the filing of the application it is referred to one of the exa- miners of title, who examines the title and certifies to the court his opinion upon it (s. 30).

If the examiner's opinion is favorable, or if the applicant elects to proceed further after an adverse opinion, a notice is published in a newspaper, addressed to all persons (by name) known to have an adverse interest, and the adjoining owners and occupants (by name) so far as known, and "to all whom it may concern," and citing them to appear and show cause why the application should not be granted (s. 31). A copy of the notice is also sent by registered mail to every person named in it whose address is known, and a copy is posted in a conspicuous place on the land (s. 32).

At the time fixed in the notice any person claiming an interest may appear and show cause (s. 34), and in default of appearance

the court may order a general default to be recorded and the application to be taken for confessed. It is provided that, "by the description in the notice, '*to all whom it may concern*,' all the world are made parties defendant and shall be concluded by the default and order" (s. 35).

A survey may be ordered for the purpose of determining boundaries, and the court may order durable bounds to be set (s. 36).

If the court finds that the applicant has not a title proper for registration, his application is dismissed (s. 37). But, if it is found that his title is proper for registration, then a decree of confirmation and registration is entered (s. 38), which contains a description of the land as finally determined by the court, and sets out the estate of the owner and all particular estates and encumbrances to which the land or the owner's estate is subject (s. 40), and a certificate of title is issued in accordance with it (s. 41).

It is provided (s. 38) that "every decree of registration *shall bind the land and quiet the title thereto*, subject only to the exceptions" of certain public rights and leases for not more than seven years, and "*shall be conclusive* upon and against all persons, including the Commonwealth, whether mentioned by name in the application, notice, or citation, or included in the general description 'to all whom it may concern.' Such decree shall not be opened by reason of" any disability, "nor by any proceeding at law or in equity for reversing judgments or decrees, subject however to the right of *any person deprived of land* or any estate or interest therein by a decree of registration obtained *by fraud*, to file a petition for review within one year after the entry of the decree, *provided* no innocent purchaser for value has acquired an interest," but if there is any such purchaser, the decree shall not be opened and shall remain in force, subject only to a right of appeal within 30 days from the date of the decree as provided by s. 14.

After registration, the same dealings may be had with land as if it had not been registered, but the instrument used for the purpose operates only as a contract and as authority for registration by the recorder or assistant recorder, and the registration by him is "*the operative act* to convey or affect the land" (s. 50).

presentation of a conveyance, with the owner's duplicate cer-
e, to the assistant recorder, he is to cancel the certificate and
a new certificate to the grantee for the land conveyed, and, if
part is conveyed, a new certificate to the grantor for the residue
57, 58).

ortgages (s. 61) and all interests less than an estate in fee
le (s. 52) are registered by a memorandum made by the assis-
recorder on the certificate upon presentation to him of the instru-
creating such interest.

ssignments, extensions, and discharges of mortgages are made
ubstantially the same manner, the mortgagee's duplicate certifi-
being produced instead of the owner's (s. 62).

he production of the owner's duplicate, when an instrument is
sented for registration, is conclusive authority for the recorder or
stant recorder to issue a new certificate or make a memorandum
accordance with the instrument, and the *new certificate* or *me-
randum* is binding upon the registered owner and all claiming
der him in favor of bona fide purchasers (ss. 55, 39), except in
case of a registration obtained by *forgery after* the original
istration (s. 55).

Where the assistant recorder is in doubt upon any question, or
ere any party in interest does not agree as to the proper memo-
ndum to be made, the question is to be referred to the court
. 53).

Any person *deprived* of any interest in land *after* the original
gistration by the registration of any other person as owner of any
terest through *fraud* or in consequence of any *error, omission,
istake, or misdescription* in any certificate or entry or memorandum,
provided with compensation out of the assurance fund (s. 96).

In the proceedings for registration complained of in the present
se, the application had been referred to an examiner and he had
eported favorably to the title of the applicants for registration
Trans. p. 13), and a notice to adjoining owners and occupiers
herein named and "*to all whom it may concern*" had been pub-
ished and sent by mail (*Id.* p. 17) and posted on the land (*Id.* p.
18), according to ss. 31, 32.

The Plaintiff in Error then filed his petition in the Supreme Judicial Court setting out the proceedings, and alleging that the Court of Registration intended to proceed at the time and place specified in the notice to determine all matters relating to the title of the applicants to the parcel of land described in their application, and, among other matters, to determine the boundary between it and the land of the Plaintiff in Error, part of which, as he claimed, was included within the boundaries claimed by the applicants. And he prayed a prohibition on the ground that the act was contrary to the Constitution of the United States and to that of the state as above mentioned and so gave no authority to the Court of Registration to determine such questions (*Trans.* p. 3–6).

An answer was filed (*Id.* p. 7), substantially admitting the allegations of the petition and alleging that the proceedings for registration had been continued to await the decision in this case. A copy of the proceedings for registration was filed with the answer as part of it (*Id.* p. 9.)

The question of the constitutionality of the act was thereupon reserved for the determination of the full court (*Id.* p. 29), and a decree was afterwards made, in accordance with the decision of a majority of the court, declaring that the act was valid and not repugnant to the Constitution of the United States or that of the state in any of the respects above mentioned, and therefore denying the prayer for a writ of prohibition, and directing that the petition stand dismissed (*Id.* p. 30).

The opinion of the majority of the court was delivered by *Holmes*, C. J. (*Trans.* p. 32); *Lathrop* and *Loring*, JJ., dissented and their opinion was delivered by the latter (*Trans.* p. 39, 56; 175 Mass. 71).

The errors assigned (*Trans.* p. 31) are

(1) That it was decided in and by the said decree that the provisions of the Land Registration Act therein mentioned and amendments thereof, whereby a decree of registration is made conclusive upon and against all persons as therein provided, were valid and not repugnant to the Constitution of the United States, whereas

ought to have been decided that the said provisions were not alid and were repugnant to the provision of the said Constitution at no state shall deprive any person of property without due rocess of law:

(2) That it was decided in and by the said decree that the provisions of the said statutes relating to transfers and dealings with egistered land after original registration were valid and not repugant to the Constitution of the United States, whereas it ought o have been decided that the said provisions were not valid and ere repugnant to the provision above mentioned of the said 'onstitution;

(3) That the prayer of the petition was denied by the said ecree, whereas a writ of prohibition ought to have been thereby ranted as in the petition prayed.

Conclusive Effect of Original Registration.

1. The *First Objection* to the validity of the act is, that the riginal registration, which deprives all persons, except the registered owner, of any interest in the land, is obtained without due process of law as against *residents* within the jurisdiction of the court that might have been served with notice there, and as against *non-residents* that are not named or described in the published notice, unless notice actually reaches them.

The Ohio registration of title act of 1896, which was similar to the Massachusetts act, was held to be contrary to the Constitution on this ground, in *State* v. *Guilbert*, 56 Ohio St. 575.

The Illinois act of 1897, which went on a different principle, was held to be valid, in *People* v. *Simon*, 176 Ill. 165, 179, on the ground that persons without notice were not concluded by the decree and were barred only by the limitation of time prescribed in it, and the court expressed concurrence in the Ohio decision as to the point above mentioned.

NATURE OF PROCEEDINGS.

The proceedings for obtaining registration are in form and substance proceedings to quiet the title of the applicant. They may be instituted by any person or persons *claiming* to own or to have the power of disposing of the legal estate in fee simple (s. 19), whether they are in possession or not. The form of application set out in s. 21 requires them to specify (3) all persons known to them to have any estate or interest in the land, and (5) the occupants of the land. The names of persons known to have an adverse interest are to be inserted in the notice (s. 31), and, by the words in the notice, "to all whom it may concern," all other persons having or claiming an adverse interest are made defendants (s. 35).

All persons having any possible claim adverse to that of the applicant are thus united as defendants to the application. The relief prayed by the applicant as against them is that his title may be confirmed (s. 21, form), and if he is successful the decree quiets the title conclusively against them, whether they are mentioned by name or included in the general description (s. 38).

These proceedings, like other statutory proceedings to quiet title, are in the nature of a suit in equity against all adverse claimants that are not in actual possession, whether the applicant is in possession or not. This is established by the case of *Holland* v. *Challen*, 110 U.S. 15, where a suit in equity was maintained in the U. S. Circuit Court by a plaintiff not in possession for the purpose of quieting his title in accordance with a Nebraska statute. As against adverse claimants in actual possession, it would seem from the same case (p. 25) that the proceedings are in the nature of an action at law to try the title. If several adverse claims exist, the proceedings have the effect of as many different suits in equity or actions at law as there are claims, all of which are instituted by the application for registration.

It is submitted that these proceedings, both as to the persons named in them as adversely interested and those made defendants by the general words of the notice, are proceedings *against persons*, like any suit in equity or action at law for the same purpose.

They appear to have been so considered by a majority of the court below, who were unwilling to treat them as proceedings *in rem*, or to admit the power of the legislature, by changing the form of proceeding from that of a suit *in personam* to that of a suit *in rem*, to avoid the necessity of giving actual notice where it had been previously necessary (*Trans.* p. 37). The sufficiency of the process will therefore be first considered here on the assumption that the proceedings are *in personam*. Afterwards the questions will be considered, whether they can be regarded as belonging to that kind of proceedings *in rem* in which actual notice to the persons interested is not required, and whether the legislature has the power, by employing a new form of proceeding (*in rem*) in such cases, to dispense with the notice that would have been necessary if the old form (*in personam*) had been used.

PROVISIONS FOR NOTICE.

The act provides for notice in three ways, viz., (1) by publication in a newspaper (s. 31), (2) by posting in a conspicuous place on the land, and (3) by registered letter (s. 32).

It is evident, as pointed out by *Loring*, J. (*Trans.* p. 40-41), that all of these notices may be given without any one of them coming to the attention of the person adversely interested.

As to the notice posted on the land, the chances are against his seeing it in the usual cases where the applicant for registration is in possession. In other cases, the notice may be removed immediately after the departure of the officer that posted it, and, if the premises were a house, even the occupant might never know of the notice. But the premises may be a forest or large field, and the conspicuous place in it may be some place in it where he would never go.

The registered letter may not reach the person to whom it is addressed, and his name may be attached to the receipt without his knowledge, or the receipt may be signed by some other person in his own name without the letter actually reaching the person to whom it is addressed, or the letter may have been sent to a wrong address and received by another person of the same name. It may be received at his residence or place of business in his absence, and forwarded without reaching him. What is not unlikely to happen is

that the registered letter will not be sent at all, because the person adversely interested is not mentioned in the application. The applicant may have been ignorant of the adverse interest, though it might have been easily known. He may have just purchased on the terms that the sale should be rescinded if the title should not pass the Court of Registration, and consequently would have had no occasion to inform himself of the state of the title. He may have believed, or thought he believed, that no such interest existed, although he knew the circumstances out of which it arose. The affidavit to the application (s. 21) would not be an obstacle in such cases. Then too he may intentionally have omitted to mention the adverse interest.

But notwithstanding the person adversely interested has no notice of the proceedings, even where he is within the jurisdiction and known and the notice is not sent or does not reach him, the act makes the decree conclusive against him. This is done, not for the benefit of the applicant alone, but in order to carry out the purpose of the act that the decree may be absolutely relied on in all subsequent dealings with the title. It therefore provides that all persons, whether mentioned by name or not in the notice, shall be included in the description "to whom it may concern" and be concluded by the decree (ss. 35, 38). The decree is subject to an appeal only within 30 days from its date (s. 14), and it cannot be set aside otherwise, except for fraud in obtaining it, in which case a petition for review may be filed within a year, but this cannot be done if an innocent purchaser for value has acquired an interest in the meanwhile (s. 38). A decree for registration might be obtained by means of a forged deed or a forged discharge of a mortgage without any notice to the true owner or the mortgagee, and after the lapse of 30 days it would be impossible for him to recover the land from a bona fide purchaser.

INSUFFICIENCY OF NOTICE BY ADVERTISEMENT.

As to all persons adversely interested that do not receive actual notice of the proceedings, there is no process of law or notice whatever, except the advertisement in a newspaper addressed "to all whom it may concern." The question is, in the first place, whether this is a sufficient process where the persons to be concluded by the

decree are known and *within the jurisdiction* and can be actually served with notice.

The following cases are authorities that such an advertisement is not due process of law as regards such persons.

Webster v. *Reid*, 11 How. 437, 459.

Brown v. *Levee Commissioners*, 50 Miss. 468.

Bardwell v. *Collins*, 44 Minn. 97.

State v. *Guilbert*, 56 Ohio St. 575.

People v. *Simon*, 176 Ill. 165, 177-8.

SUBSTITUTED SERVICE.

It is not questioned that a state may provide for determining all questions regarding the title to property within its limits, or for disposing of any other matter within its jurisdiction, although the defendant may, by reason of absence or otherwise, be beyond the reach of process. In such cases of necessity, a substituted service by publication or any reasonable method of imparting notice may be resorted to.

Arndt v. *Griggs*, 134 U.S. 316.

So too the defendants may be persons that for some reason cannot be ascertained, and a general description such as "heirs of A.B. or such persons as shall become the heirs or appointees of A.B. a living person" may be authorised, as was done by the Massachusetts statute (1897, c. 522) applied in *Loring* v. *Hildreth*, 170 Mass. 328.

An extreme case where the rule of necessity was invoked is that of *Shepherd* v. *Ware*, 46 Minn. 174. Judgment had been obtained after service by publication in a previous action to determine adverse claims to land against a defendant named and "all other persons or parties *unknown* claiming any right." The addition of these general words was authorised by a statute. When the action was commenced, the defendant that was named had already parted with the land, but the conveyance was not recorded. The court held, apparently with doubt, that the statute was valid, but its provisions must be strictly followed and reasonable diligence must be used to ascertain such parties as were known. As this appeared to have been done, the judgment was held to be valid as against the

grantee. The principle upon which the case was decided was thus stated, "The legislature may in its discretion provide for substituted service in case of necessity or where personal service is for any reason impracticable, in an action where the controversy relates to property which is within the jurisdiction of the court."

Effect has also been given to statutes authorising notice by publication in the case of *unknown* persons that could not be discovered by due diligence in Ohio (*Sullivant* v. *Weaver*, 10 Ohio 275) and in Mississippi (*Belcher* v. *Mhoon*, 47 Miss. 613).

These are exceptional cases, justified only by the necessity of preventing a failure of justice where the court has jurisdiction of the matter and the adverse party is not within reach of its regular process. But where the necessity does not exist, the ground of the exception fails. This is shown by these decisions in the three states last mentioned: *Brown* v. *Levee Commissioners*, 50 Miss. 468; *Bardwell* v. *Collins*, 44 Minn. 97; *State* v. *Guilbert*, 56 Ohio St. 575.

FUNDAMENTAL RIGHTS.

There is no question of forms of proceeding or of process. Nobody doubts that forms may be changed to any extent, provided that fundamental rights are not impaired. The only question is what rights are fundamental. The extent to which changes may be made without disturbing such rights is illustrated by such cases as *Hurtado* v. *California*, 110 U.S. 516, and *Maxwell* v. *Dow*, 176 U.S. 581.

Matthews, J., in *Hurtado* v. *California*, 110 U.S. p. 530–1, in an eloquent passage asserted the power of our legal institutions in their growth to adapt themselves to new forms and processes, consistently with the use of due process of law.

"But," he says (p. 535), "it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general

law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.'"

And at p. 536, he continues,

"The Supreme Court of Mississippi in a well-considered case, *Brown* v. *Levee Commissioners*, 50 Miss. 468, speaking of the meaning of the phrase 'due process of law' says: 'The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights, which that system of jurisprudence, of which ours is a derivative, has always recognised. If any of them are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by due process of law.'"

In *Holden* v. *Hardy*, 169 U.S. p. 389, it is said,

"This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard, as, that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence."

It is also expressly recognized in unambiguous terms, in *Hagar* v. *Reclamation District*, 111 U.S. p. 708, and *Iowa Central Ry. Co.* v. *Iowa*, 160 U.S. p. 393, that a right to *notice* and an opportunity to be heard are fundamental rights secured by the requirement of due process where life or liberty or the title of property is involved.

DECISIONS AS TO REQUIREMENT OF NOTICE.

Upon these principles, this Court held in *Webster* v. *Reid*, 11 How. 437, that a valid judgment could not be obtained against the owners of certain lands in the territory of Iowa, called the half-breed lands, where there had been no other service of process than a statutory notice of publication addressed "*to the owners of the half-breed lands lying in Lee County.*" A territorial statute had provided that the commissioners under an act for the partition of certain lands of half-breed Indians, commonly called the half-breed lands,

might commence actions for their several accounts against t owners, and give eight weeks' notice to them by publication, a upon trial and allowance of their accounts have judgment for t amount and costs, which should be a lien on the lands, and that t words "owners of the half-breed lands lying in Lee County" sho be a sufficient designation of the defendants. Judgments havi been obtained and enforced against the land, this Court held t they were void, saying (p. 459):

"By the act under which the suits were instituted, no other designati of the defendants was required than 'Owners of the half-breed lands ly in Lee County.' These suits were not a proceeding *in rem* against t land, but were *in personam* against the owners of it. Whether they resided within the territory or not does not appear, nor is it a matter of a importance. No person is required to answer in a suit on whom proc has not been served, or whose property has not been attached. In t case there was no personal notice, nor an attachment or other proceedi against the land until after the judgments. The judgments therefore a nullities and did not authorise the executions on which the land was sol

This case is a direct authority that, in proceedings *against pers* residing within the jurisdiction, personal notice is necessary a notice published in a newspaper is not sufficient to support judgment, although the judgment would have been a lien up certain specified land.

In *Brown* v. *Levee Commissioners*, 50 Miss. 468, the levee co missioners had bought certain lands sold for levee taxes and filed bill in accordance with an act of 1872 against "*all persons having claiming any interest, either legal or equitable, in and to the lan herein described*," as defendants, without naming any individua praying a sale of the lands or those parts against the sale of whi no good cause was shown. Notice was published under this tit requiring all persons having or claiming interest to show cause, &c in accordance with the act, and a decree was made, reciting t publication and that no cause had been shown, and directing a sal The court held that the act was unconstitutional and the decree invali The judgment contains a full discussion of the meaning of the e pression *due process of law*, and the nature of remedies betwe parties, of those touching both the person and the thing, and tho

purely *in rem*, and the kinds of process required in each class (p. 478-483). After using the language concerning fundamental rights quoted in *Hurtado* v. *California*, 110 U.S. p. 536 (*supra*, p. 13), *Simrall*, J., said (p. 482),

"Whilst 'processes' are in the power of the legislature, it must respect that ancient and fundamental right which has always belonged to parties sought to be charged in their persons and property, that they shall have *notice* of the suit. Courts of common law and equity cognisance have always exacted *personal notice*, if practicable, that is, if the defendant was commorant within the territorial jurisdiction, and if he could be found. But in order to prevent a failure of justice, *ex necessitate*, if personal notice could not be given, an inferior mode, such as in the wisdom of the legislature might be thought likely to impart actual notice, has been allowed, — such as leaving a copy of the summons with a member of the defendant's family, or affixing it to the door of his domicil, and in certain cases by publication in a newspaper."

The court concluded that the statute authorising the proceedings was in contravention of the Constitution for several reasons, and among them (p. 488),

"Because it expressly denies *personal service* of process upon the defendants, when it is evident that many, perhaps most of them, are residents of the county and state, and amenable to such process."

In *Bardwell* v. *Collins*, 44 Minn. 97, which was an action to enforce a mechanic's lien, alleging that the defendant Collins claimed an interest, the only service was by publication according to a statute authorising service by publication on all parties against whom no "personal judgment" was sought, where the action was to foreclose a mortgage or to enforce a lien on real estate. Judgment having been given against him by default, he moved to set it aside for want of service of process, and it was held that the statute was unconstitutional. The judgment follows closely the reasoning in the case last mentioned. Regarding the cases in which the statute was applicable it is said by *Mitchell*, J. (p. 100),

"We think it clear that the expression 'personal judgment' is here used in the sense of a money judgment for the mortgage debt; and while the legislation on the subject, as we have narrated it, has been rather incongruous in some respects, and while we have been unable to discover where

the commissioners who prepared the Revision of 1866 found any precedent for so radical a departure from the universal course of judicial procedure from time immemorial, and while we are unable to conceive what considerations induced them to adopt it, yet its plain and unequivocal language compels us to the conclusion that this statute was intended to provide that service of the summons by publication might be made on all defendants in foreclosure suits whom it was not sought to hold personally liable for the mortgage debt, although residents of the state, and personal service might be made on them within its jurisdiction."

The court then proceeded to consider the validity of such service (p. 101),

"The only remaining question therefore is whether it is competent for the legislature to authorise such service in such actions upon residents of the state personally present and capable of being found and personally served within its jurisdiction. Is such service 'due process of law'? In determining this question, it becomes important first to consider the character of an action to foreclose a mortgage. It is not an action *in rem*, but *in personam*. . . . Next, it is not only an action *in personam*, but is also strictly judicial in its character, proceeding according to the due course of the common law, like any other ordinary action cognisable in courts of equity or common law. These facts are important for the reason that what would be due process of law in one kind of proceeding might not be such in another, for reasons that will be alluded to hereafter.

"No court has ever attempted to give a complete or exhaustive definition of the term 'due process of law,' for it is incapable of any such definition. All that can be done is to lay down certain general principles and apply these to the facts of each case as they arise. Mr. Webster, in his argument in the Dartmouth College Case, gave an exposition of the words 'law of the land,' and 'due process of law,' which has often been quoted by the courts with approval, viz.: 'The general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.' In judicial proceedings, 'due process of law' requires *notice*, hearing, and judgment. It does not mean, of course, the general body of the law, common and statute, as it was at the time the Constitution took effect, for that would deny to the legislature the power to change or amend the law in any particular. Neither, on the other hand, does 'the law of the land' or 'due process of law' mean anything which the legislature may see fit to declare to be such, for there are certain fundamental rights which our system of jurisprudence has always recognised, which not even the legislature can

gard in proceedings by which a person is deprived of life, liberty, or erty, and one of these is notice before judgment in all judicial proceed- . . . In proceedings *in rem*, as in admiralty and the like, where the ess of the court goes against the *thing*, which is in the custody of the t and is technically the defendant, and persons are not made parties to uits but come in rather as intervenors, it is not essential to the juris- on that persons having an interest in the thing to be affected by the ment should have personal notice of the proceeding, or in fact any other e than such as is implied in the seizure of the thing itself. There are r proceedings in the nature of proceedings *in rem*, many of them not tly judicial, and none of them proceedings according to the course of the mon law, such as the probate of wills, administration on the estates of ased persons, the exercise of the right of eminent domain, the exercise ie power of taxation, which affect property rights, but in which personal ce to persons interested in the subject or object of the proceedings has er been deemed necessary. Some form of substituted service of notice, y publication, has always, from considerations of public policy or ssity, been deemed appropriate to such proceedings, and hence, as to n, 'due process of law.' But we think that, from the earliest period English jurisprudence down to the present, as well as in the jurispru- e of the United States derived from that of England, it has always been idered a cardinal and fundamental principle that, in actions *in personam* eeding according to the course of common law, *personal service* (or its valent, as by leaving a copy at his usual place of abode) of the writ, ess, or summons must be made on all defendants resident and to be found in the jurisdiction of the court. We do not mean that the term 'pro- ing according to the course of the common law,' as used in the books, be understood as meaning, necessarily and always, personal or actual ce of process, for, although service by publication is of modern origin, has always been some mode by which jurisdiction has been obtained mmon law by something amounting to or equivalent to constructive ce, where the defendant could not be found and served personally. what we do mean to assert is that the right to resort to such construc- or substituted service on personal actions proceeding according to the se of the common law rests upon the necessities of the case, and has ys been limited and restricted to cases where personal service could e made because the defendant was a non-resident, or had absconded, d concealed himself for the purpose of avoiding service."

nd in conclusion (p. 104): "We think it would be a surprise to the h and the bar of the country, if it should be held that process or sum-

mons in ordinary civil actions might be served on resident defendants, present and capable of being found within the jurisdiction of the court, merely by publication in a newspaper. The dangers and abuses that would arise from such a practice are too apparent to require to be named or even suggested. . . . Service by publication in such circumstances is not due process of law, and therefore any statute assuming to authorise it is unconstitutional."

In *State* v. *Guilbert*, 56 Ohio St. 575, the Ohio act of 1896 providing for the registration of title was held to be repugnant to the Constitution, because the publication of a similar notice was not due process of law. The provisions regarding the application, notice, and conclusive effect of registration (pp. 603–609) were similar to the corresponding provisions of the Massachusetts act. In delivering the judgment of the court, *Shauck*, J., says (p. 617):

"The precise objection urged against the act in this regard is that it provides for the divesting of rights in property by the proceeding to register without the issuance and service of summons according to the law of the land. . . . The terms of the act require that the court shall cause the applicant or some other competent person to serve each person named in the application, resident of the county, with a copy of the printed notice. All persons, named in the application, resident without the county though within the state, shall be served by sending copies of such notice to their addresses by mail. Only those who are named in the application are required to be served even in this manner. Reference to s. 7, providing what the application shall contain, and to its form as prescribed in s. 8, shows that the persons to be thus named and served are the owners of the land adjoining that sought to be registered, the occupant of the land to be registered, if it is occupied, and the holders of easements and estates inferior to the fee simple. One known to claim the title in fee simple adversely to the applicant need not be named in the application nor receive a copy of the notice, though his place of residence may be within the county and known. As to him the only requirement is that he may have a chance to see a notice signed by the applicant, addressed '*To whom it may concern*,' containing a brief description of the land to be registered, and published in any newspaper of general circulation within the county" [form, p. 603].

And at p. 620, "That the legislature may provide for a substituted service of judicial process, when it is required by necessity, is not doubted. If, in a suit to adjudicate the rights of persons in property within the

tate, a defendant resides without the state, such necessity is apparent, for he process of the state has no efficacy beyond its borders. Other cases of necessity are recognised.

"The principle is that the state may provide for the adjudication of all adversary rights of persons in property within its borders, and to the end hat such jurisdiction may be complete, the legislature may provide a substituted service of process for cases in which actual service cannot be nade. In such case nothing more is required by the law of the land than hat the substituted service shall be such as in the exercise of legislative liscretion shall be found most apt to accomplish the purpose of actual service. *Shepherd* v. *Ware*, 46 Minn. 174."

And at p. 621, "We know of no instance prior to the passage of this act in which there was a departure from the views clearly stated by Judge Cooley (Const. Lim. 6th ed. 452), 'In judicial investigations the law of the land requires an opportunity for a trial, and there can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery, public officers may connive with rogues to rob the citizen of his property, witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes, and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law.'

"If it is borne in mind that the questions here considered concern the adversary rights of persons in property, it will sufficiently distinguish the cases which involve the police power, or the right of eminent domain, or the right of taxation."

In *People* v. *Simon*, 176 Ill. 165, the Illinois registration of title act of 1897 was held, one judge dissenting, to be valid, on the ground that according to its construction, the decree of registration was conclusive only upon such persons as were actually served with process or had notice of the proceedings, and that others were barred by the limitation of time contained in it for asserting their claims (ss. 26, 28). But the court, in dealing with the objection that the act authorised a judgment against a resident of the state upon mere constructive service, plainly stated the law to be that substituted service was only permitted in some cases, particularly in that of non-residents, on account of the necessities of the case, and was not admissible in the case of a resident (p. 176). As

regards the particular clause on which the objection was founded, the court said, that it seemed to attempt to make a decree binding upon persons not parties to the suit, and, if given effect to literally, would deprive persons of vested rights without due process of law, and to that extent it could not be upheld; but as it allowed a period of time for persons without notice to assert their claims, it might be construed to make the decree binding only on those properly before the court, while the others would be barred by the limitation after the time had elapsed (p. 177-8). The Ohio case, *State* v. *Guilbert*, 56 Ohio St. 575, above mentioned, having been referred to, the court said (p. 179) that they agreed with the conclusions of that case, viz., that the Ohio statute was unconstitutional, the main ground of that decision being that the statute, in providing for the initial registration, attempted to give jurisdiction to the court without service of summons, and this, it was held, fell short of that due process of law guaranteed by the Constitution.

Nothing contrary to these five cases is to be found in *Parker* v. *Overman*, 18 How. 137, which was a statutory proceeding to confirm a sale for taxes commenced in a state court by a published notice to all persons interested to show cause. The defendants, who were citizens of other states, appeared in the state court, and removed the case to the U. S. Circuit Court. This Court raised the question of jurisdiction, and it was held that, as the case was in the nature of a bill of peace and consistent with the usual proceedings in equity, the federal court had jurisdiction. No question arose whether the published notice was a sufficient process to affect persons not reached by it, and at that time (1855) the 14th amendment had not been adopted. As the defendants had appeared, there was a case pending in the state court between them and the plaintiffs, which was properly removed. The decision on the merits was in favor of the defendants, but there is no reason why the decision, if it had been the other way, should not have bound the defendants, although other persons might not have been affected by it.

If resort is had to the test used in *Murray* v. *Hoboken Land Co.* 18 How. p. 276, to determine whether a process is sufficient that

does not give actual notice, and the settled usages existing at the time when the Constitution was established are regarded, no justification can be found for such a course of proceeding.

The fundamental principle of process is actual notice and an opportunity to be heard. *Loring*, J., showed in an elaborate opinion in the court below that a judgment obtained without personal notice to the adverse party, even where process has been served by leaving it at his residence, has never been held to be conclusive against him, and that some means has always existed for getting rid of it, sometimes provided by statute, sometimes by the courts (*Trans.* p. 41–45).

GROUNDS OF DECISION OF THE COURT BELOW.

A majority of the court below appear to have thought that the Constitution required effectual notice to all claimants who are known or can by reasonable effort be ascertained (*Trans.* p. 37). But it is difficult to discover the grounds upon which they considered that the notices required by the act were sufficient when they did not reach the persons for whom they were intended. The only passage in the opinion that gives any indication of it is the following (p. 37): —

"As to claimants living within the State, and known, the question seems to come down to whether we can say that there is a constitutional difference between sending notice of a suit by a messenger and sending it by the post-office, and beside publishing in a newspaper, recording in the registry, and posting on the land. . . . When we are considering a proceeding of this kind, it seems to us within the power of the legislature to say that the mail, as it is managed in Massachusetts, is a sufficient messenger to convey the notice when other means notifying the party, like publishing and posting, also are requisite."

No question had been raised by counsel as to the validity of a notice served by sending it through the post-office, *if the notice was received*. The objection was that the notice, if sent, *might not reach* the adverse party, and that it *might even not be sent*, but in either case the act assumed to make the decree conclusive against him. It is no answer to this objection to say that the mail is a suffi-

cient messenger to convey the notice. Notice is not served by giving it to a messenger to carry, but by his delivering it to the person for whom it is intended. The important point is whether the notice is received or not.

The statement in the passage above quoted regarding the sufficiency of the notice sent by mail seems in its terms to be limited to cases where other means of giving notice, such as publishing and posting on the land, are also employed. But it is obvious that the notice sent, or required to be sent, by mail is not made either better or worse by the use of other means of giving notice. If the notice were not in fact so sent, or, being sent, were not received, that means of giving notice to the person interested would fail, whether some other means of doing so were employed and succeeded or not. The requirement that three different methods of giving notice shall be employed shows the wish of the authors of the act that the notice shall actually reach the persons interested. But if all those methods fail of their purpose, and the decree is still conclusive against them, then they are concluded without having had notice of the proceedings or an opportunity to be heard.

In this passage *the recording* of the application *in the registry of deeds* is referred to as if the majority of the court attached some weight to it as notice to adverse claimants. Another remark in the same opinion at the foot of p. 36 is to the like effect.

But what is recorded in the registry of deeds is no notice to anybody except persons *acquiring title afterwards*, and it does not in any way affect those that are already entitled to any estate or interest.

George v. *Wood*, 9 Allen 80, 83.
Robinson v. *Bird*, 158 Mass. 357, 361.

It is apparent that the only object of the act in requiring this (s. 20), is to give notice to purchasers during the pendency of the proceedings, so that they may take care not to be left out when the decree of registration is made. It is recorded long before it is known that there will be any occasion to give notice to persons adversely interested, which is provided for in ss. 31, 32. Dealings with the land may go on without regard to the proceedings (s. 29), but any

interests so acquired will be lost if they do not appear in the decree of registration (s. 39). Notice of the pendency of the proceedings is therefore to be recorded for the benefit of purchasers. But such notices of *lis pendens* are never notices to the parties to the controversy.

As regards the *probability* of actual notice to adverse claimants by this means, there is not one chance in a thousand that any one would ever have it brought to his attention. People are not in the habit of searching the registry to discover attempts to deal with their land by others after their own title has been acquired.

But although the majority of the court hold that the notice by mail or otherwise is sufficient as to *known claimants within the state*, as well as to others, it is evident that they do not think the act secures actual notice to such persons. For it is said (*Trans.* at the foot of p. 36) that they think the act ought to be amended in that direction, and, if it is not amended, that the judges ought to do all in their power to prevent a failure in that regard; and (at the foot of p. 37) they "agree that *such an act as this is not to be upheld without anxiety*. There would be no occasion for amendment of the act or for such anxiety, if the act secured to adverse claimants the reasonable notice and fair opportunity to be heard that the Constitution requires before their rights are concluded by the decree.

When the case was decided by the court below, the act did not require that the notices by mail to adverse claimants should be registered (s. 32). It has since been amended (1900, c. 354, s. 4), and now requires that such notices shall be sent by registered letter, and that the court shall, so far as it deems it possible, require proof of actual notice (*Appendix, post*, p. 83). As the proceedings complained of in this case are still pending, this amendment seems applicable to them, and the case has been discussed accordingly.

EXAMINATION OF TITLE BY THE OFFICIAL EXAMINER.

It may be urged that the examination of the title by the official examiner is a protection of adverse interests. It would be sufficient to say that this kind of protection cannot dispense with the consti-

tutional requirement of due process in order that the persons adversely interested may protect themselves.

The examiner proceeds independently, without assistance from anybody adversely interested, and reports to the court, not the details of his examination, but only his opinion upon the result. In the present case he merely found the title of record to be good, subject to a specified mortgage and the taxes for the year (*Trans.* p. 13). There is no abstract of title, or indication of any details relating to it, by which the accuracy of his examination may be verified, or by which the correctness of his opinion may be judged. Unless an adverse claimant appears to assert his rights, there is no real trial (s. 35), and nothing comes before the judge, except what is stated in the application and in the opinion of the examiner, and the decree is pronounced upon that alone. The examiner thus becomes the real judge, and the only security for the protection of adverse interests.

The examiner may make mistakes in fact and law. He may overlook a conveyance or an undischarged mortgage, or be misled by a forged deed or forged discharge of a mortgage. A right of way or drainage or other easement may have been gained by user and not appear in the records, and he may not discover it, although the applicant may be aware of its existence. He may easily make a mistake as to the legal effect of documents before him, and even without seeing the point involved. Some former owner, whom he supposes to be entitled in fee simple, may have had only a life estate by reason of the omission of the word "heirs" in an old will. An estate devised to one and his heirs, and cut down to an estate tail by a gift over upon an indefinite failure of issue, may be supposed by him to have passed by the will of the tenant in tail. Or, as in *Ayer* v. *Philadelphia Brick Co.*, 157 Mass. 57, what he assumes to be a good title may have been lost by an estoppel created by a covenant in a deed made before the title was acquired. In almost any case where a question of title has come before the courts, an examiner might have reported favorably upon the title. It is also possible that the examiner may be persuaded or influenced by the applicant to take a view favorable to him, and even fraud is possible. Upon

this last suggestion, the passage from Cooley Const. Lim. quoted by the court in *State* v. *Guilbert* (*supra*, p. 19) may be referred to.

In each of these cases the adverse claimant is unprotected even by the examiner and has no opportunity to protect himself. The judge acts only upon what is laid before him and without knowledge of the facts and without having the question brought to his attention. The judge is in the same position as regards the requirement of s. 32 as amended, that he shall, so far as he deems it possible, require proof of actual notice. How can he know who ought to have actual notice, besides the persons mentioned in this application and the examiner's report? How can his decision upon the evidence, that actual notice has been given to the persons so mentioned, be conclusive upon them, if they have not had notice?

The danger of making the constitutional right of an adverse claimant depend on the negligence or good faith of his opponent and the examiner is clearly pointed out by *Loring*, J. (*Trans.* p. 48).

POWER OF THE STATES TO PRESCRIBE WHAT SHALL BE DUE PROCESS.

This Court has several times declared that it is not in the power of a state to make anything that it chooses due process of law.

Murray v. *Hoboken Land Co.*, 18 How. 272, 276.

Davidson v. *New Orleans*, 96 U.S. 97, 102.

Chicago, Burlington, & Quincy Rld. Co. v. *Chicago*, 166 U.S. 226, 235.

Holden v. *Hardy*, 169 U.S. 366, 390.

But it would be difficult to find anything that a state could not do, if an advertisement in the newspaper, without the names of the persons interested, were considered due process of law in a suit to quiet title against persons that were known and could be personally served within the state. That is the only process provided by this act where the persons adversely interested are not mentioned in the application, and by the terms of the act it is sufficient to support a conclusive decree against them.

SUPPOSED DIFFICULTY OF CLEARING TITLES.

In the opinion of the majority of the court below, a supposed difficulty of clearing titles against all the world, if the process

provided by this act is not sufficient, is suggested as follows (*Trans.* p. 33),

"If it does not satisfy the Constitution, a judicial proceeding to clear titles against all the world hardly is possible, for the very meaning of such a proceeding is to get rid of unknown as well as known claims; indeed, certainty against the unknown may be said to be its chief end, and unknown claims cannot be dealt with by personal service upon the claimant."

The objection to the act is *not* that it provides an insufficient notice in the case of *unknown* claims, but that it attempts to get rid of *known* claims without notice to the claimants in cases where there is no obstacle to giving such notice. There is no difficulty in clearing the title as against such claims. But that would not be sufficient for the purpose of the act. That purpose is that the decree shall be conclusive against *all* claims, *whether known or unknown*, although in the case of known claims no actual notice has been given or the decree has been obtained in fraud or disregard of such claims. If such an effect were given to a decree so obtained in an ordinary suit to quiet the title, everybody would recognise that it was contrary to the first principles of justice. It is none the less so, that the decree is intended to be the basis of subsequent dealings with the title and to enable the person that obtains it to transfer an unquestionable title to a purchaser.

See *Williams* v. *Gibbes*, 17 How. p. 256, where this Court quoted what was said by *Leach*, M.R., as to the injustice of giving to proceedings the effect of conclusively transferring the property of the true owners to one who has no right to it, after a notice given only by advertisement which does not reach the parties really entitled.

It is not necessary to disregard the principles of justice in this way, even for the purpose of registering titles. It may be a convenient and easy way of disposing of the rights of other people, to advertise in a newspaper a notice to whom it may concern, and to enter a decree forever excluding the claims of all that do not appear, without even allowing them compensation (s. 96) in case of mistake or fraud. But it is not necessary to resort to such harsh and sum-

mary methods. If the decree of registration concluded only those to whom proper notice (personal or substituted) is given, it is certain that fewer claims would remain undiscovered. The possible cases, where an adverse right that might have been ascertained has been overlooked, could be provided for by compensation out of the assurance fund *to the purchaser*. The certificate of title would thus be a *guarantee* of the title specified in it. It is doubtful however if any claims would ever be made for compensation on this ground. There are not so many adverse claims that cannot be ascertained, as it is sometimes assumed.

In an examination of the title conducted on behalf of those whose interest it is that no mistake shall be made, it is rare that any possible adverse claim remains undiscovered. The experience of title insurance companies shows this, and the state, with its power of providing new and simple methods of determining the existence of possible claims, is in a much more secure position. But if adverse rights can be got rid of by a general advertisement in a newspaper and a decree by default, there is every encouragement to carelessness, concealment, and fraud.

Titles might also be registered simply as *possessory titles* without any inquiry as to the previous title. Subsequent transactions would be conducted on the register; purchasers would only have to examine the title previous to the registration, and this would become unnecessary after the lapse of time. The English Land Transfer Acts provide for registration, with either an absolute or a possessory title (*Brickdale & Sheldon's Land Transfer Acts*, 9, 134). Any system that does not provide for such registration of titles, without any examination of the previous title, has the serious defect that it can apply only to a limited part of the lands in the state, namely, those of which the title is already beyond question.

No doubt there are also other ways in which registration of title is practicable, for example, the Illinois way. These illustrations are sufficient to show that it is not necessary to disregard the rights of others in order to give effect to it.

As to Non-Residents.

2. The original registration is also obtained without due process of law as against persons *out of the jurisdiction* when they are not mentioned by name or sufficient description in the published notice among those to whom it is addressed.

In such cases any reasonable means of imparting notice to such persons is due process of law (*Arndt* v. *Griggs*, 134 U.S. p. 321).

But a published notice addressed only *to whom it may concern* is not a reasonable means of accomplishing this purpose. Still less is it reasonable when the words "to all whom it may concern" are preceded by the names of other persons not including the names of those whose rights are involved. (See the form in the act, s. 31, also in the Transcript of Record, p. 14.)

As their names are not mentioned in it, their attention would not be attracted if they happened to see it. They might see the descriptions in the notice (*Trans.* p. 15–16) without its occurring to them that they were interested in the lands so described or in the adjoining lands, and the absence of their names in the address of the notice would prevent their reading it. But if their names were mentioned in it, or they were mentioned as the heirs or devisees of A.B., the name would attract their attention, or, if they did not see it, would indicate their interest to their friends or acquaintances who might call it to their attention. It is upon such things as this that published notices depend for their effect.

In *Brown* v. *Levee Commissioners*, 50 Miss. at p. 485, the court says, —

"The course of judicial process, as heretofore established in our laws, was, where the subject was local, but the necessary defendants could not be reached by ordinary process, to give notice by publication to the absent and non-resident, addressed to them *by name*. There is an exceptional case or two dispensing with naming the defendants, in proceedings against the unknown heirs of a decedent, where the plaintiff does not know and cannot ascertain their names. But there is no instance in our legal history where a judicial process has been allowed in personal suits, dispensing with notice, actual or constructive, addressed to the parties by

me, to be charged thereby, where it could be readily ascertained who ey were. As we have seen, the practice has been so uniform and cient, that the defendants must be named, if known, and that they must ve personal notice by due service, or a constructive notice by some eans which the legislature has prescribed, as calculated to come home to e party, that a departure from it in a special case would be obnoxious to e objection that it was not according to due process of law."

As to Persons not in Being.

3. As regards persons *not in being*, the act does not depend on e published notice for the conclusiveness of the decree, for it is mpossible to make any kind of service upon them.

Resort is had to the doctrine of *Clark* v. *Cordis*, 4 Allen 466, 75, where it was held, on the ground of necessity, that the rights f unborn persons might be determined in a suit where proper pro- ision had been made for protecting their interests. This was fol- owed in *Loring* v. *Hildreth*, 170 Mass. 328. By this act (s. 33) he court is authorized to appoint a disinterested person to act as uardian *ad litem* for them.

But if the possibility of unborn persons having an interest does ot appear, or is overlooked, and the court does not exercise its ower of appointing somebody to represent them, then they are ithout protection, as well as without notice.

If the court should attempt to overcome this difficulty by appoint- ng a guardian *ad litem* in all cases to act generally for any persons ot in being that might have an interest, without ascertaining hether there may be any such persons or what their interests may e, the protection would be merely colorable and would not effect its urpose. The guardian could hardly be expected to undertake a resh investigation of title for the purpose of discovering the persons e represented, and it is very likely that he would be representing onflicting interests without knowing it or doing anything for any f them.

These persons form *another class* that may be deprived of their roperty without due process of law.

PROCEEDINGS IN REM.

4. It will be urged that the proceeding for registration is a *suit in rem*, and that the direct notice required by the Constitution in a *suit between parties* is consequently dispensed with.

This contention is based on the course of proceeding in certain suits in admiralty, called *suits in rem*, in which it is not necessary to give direct notice to the persons interested, and yet they are concluded by the decree. It is asserted that the proceedings for registration are of such a nature as to justify the application to them of the phrase *in rem* in some sense. The conclusion is then drawn that it is not necessary to give any notice in such proceedings that would not be required in a suit *in rem* in admiralty.

Suits *in rem* in admiralty and similar proceedings by the government for confiscation of enemy's property or property seized for violation of the revenue or other laws, are the only ones that are strictly and properly called suits *in rem*.

See Dicey Confl. L. 263.

Union Ins. Co. v. *U. S.*, 6 Wall. 759.

Miller v. *U. S.*, 11 Wall. 268, 294, 303.

They are said to be *in rem*, because they are directed *against the thing* as the defendant. Process is served by arrest of the *res* against which the suit is brought, and it is not necessary to give actual notice to persons adversely interested, whether they are within the jurisdiction or not.

The phrase *in rem* however is often applied in a qualified sense to judicial proceedings *against persons* affecting property within the jurisdiction. The object is to indicate that the effect of the proceedings is limited to the property because the persons are not subject to the jurisdiction. Some qualifying expression (such as *quasi* or *in the nature of*) is commonly used in connection with it to show that it is not intended to describe a regular *suit in rem*, or, if the qualification is not expressed, it is understood. When the persons are within the jurisdiction, the effect of the proceedings on the property is exactly the same, but it is not limited to the property and the phrase is not applied to them. In these cases it is necessary to give

otice to the defendants, by *actual service* upon such as are within ie reach of process, and by *substituted service* upon such as are out f the jurisdiction or for some other reason cannot be so served. ubstituted service may be made by publication of a notice designat- g them or by some other reasonable means. But there is *no uthority whatever* for employing only a general notice addressed to whom it may concern" as to defendants within or without the urisdiction.

A definition of a *proceeding in rem* is given by *Marshall*, C.J., n *Mankin* v. *Chandler*, 2 Brock. p. 127; 16 Fed. Cas. p. 626. It aving been urged that proceedings in which a debt had been at- ached were *in rem*, and concluded an assignee, he said,

"What is the nature of a proceeding *in rem?* And in what does its specific difference from an ordinary action consist? Is every action in which a specific article is demanded a proceeding *in rem*? If it were, *a rit of right* which demands lands, of *detinue* which demands a personal chattel, would be a proceeding *in rem*, to which all the world would be parties and by which the rights of all the world would be bound. But this, all know, is not the law. What then is the rule by which cases of this description are to be ascertained?

"I have always understood that where the process is to be served on the thing itself, and where the mere possession of the thing itself, by the service of the process and making proclamation, authorises the court to decide upon it without notice to any individual whatever, it is a proceeding *in rem*, to which all the world are parties."

In *The Mary*, 9 Cranch p. 144, *Marshall*, C.J., explains the saying that all the world are parties to a suit in admiralty,

"The *whole world*, it is said, are parties in an admiralty cause, and therefore the whole world is bound by the decision. The reason on which this doctrine stands will determine its extent. Every person may make himself a party and appeal from the sentence, but notice of the controversy is necessary in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally or by publication; where they are *in rem*, notice is served upon the thing itself. This is necessarily

notice to *all those who have any interest in the thing*, and is reasonable, because it is necessary, and because it is the part of the common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it. Every person therefore *who could assert any title* to the Mary has constructive notice of her seizure and may fairly be considered as a party to the libel. But *those who have no interest* in the vessel which could be asserted in the court of admiralty, have no notice of her seizure, and can, on no principle of justice or reason, be considered as parties to the cause so far as respects the vessel."

This is stated more shortly by *Gray*, J., in *Scott* v. *McNeal*, 154 U.S. p. 46,

"Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually, or by the thing condemned being first seized into the custody of the court."*

Field, J., says, in the *The Moses Taylor*, 4 Wall. p. 427,

"The distinguishing and characteristic feature of such suit [a suit in admiralty] is that the vessel or thing proceeded against *is itself seized* and *impleaded as the defendant*, and is judged and sentenced accordingly."

In *Hine* v. *Trevor*, 4 Wall. p. 571, *Miller*, J., speaking of the case before the Court, said,

"It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*. The statute provides that *the vessel* may be sued and made *defendant* without any proceeding against the owners, or even mentioning their names. That a writ may be issued and *the vessel seized*, on filing a petition similar in substance to a libel. That after a notice in the nature of a monition, the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued."

In *Freeman* v. *Alderson*, 119 U.S. p. 187-8, *Field*, J., explains the distinction between regular suits *in rem* and proceedings to which the expression *in rem* is applied in a qualified sense, as follows,

"*Actions in rem*, strictly so considered, are proceedings against property alone, treated as responsible for the claims asserted by the libellants or

* These statements regarding the parties to a suit *in rem* agree exactly with the account of the origin of suits *in rem* contained in the judgment of *Jeune*, J., in *The Dictator*, [1892] P. D. pp. 311-313; *post*, p. 38.

plaintiffs. The property itself is in such actions the defendant, and, except in cases arising during war for its hostile character, its forfeiture or sale is sought for the wrong, in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases *by its seizure*, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case.

"There is however a large class of cases which are *not strictly actions in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought *against persons*, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which the property of *non-residents* is attached and held for the discharge of debts due by them to citizens of the state,* and actions for the enforcement of mortgages and other liens. Indeed all proceedings having for their sole object the sale or disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that *citation to him is required*, and that judgment therein is only conclusive between the parties."

In *Meyer* v. *Kuhn*, 65 Fed. R. p. 712, where, in a suit for partition, a mistake had been made in the name of a non-resident defendant to whom notice was given by publication, the present Chief Justice said,

"Proceedings in partition or to quiet title *are not strictly proceedings in rem*, for they are not taken directly against property, but they are regarded, as far as they affect property, as *proceedings in rem sub modo*, in respect of which, while there must be reasonable notice to the parties, personal service is not essential to jurisdiction, and constructive service may be substituted. *Arndt* v. *Griggs*, 134 U.S. 316. When however constructive service by publication is substituted by statute in place of personal citation, a strict compliance with statutory provisions is exacted."

---

*In the offices of the clerks of the courts i Massachusetts, the jurisdiction in these cases has long been designated as *ex re*, which seems to indicate its derivation as well as the phrase *in rem*, and without the danger of confusion arising from the use of a phrase that has already acquired a distinct technical meaning.

See also,

Pennoyer v. *Neff*, 95 U.S. pp. 727, 734.
Burke v. *Trevitt*, 1 Mason p. 100.
The Hibernia, 1 Sprague p. 82.

In proceedings by the government *in rem* for the condemnation of *land* as enemy's property, the same rules, as regards seizure and notice, are observed. In *Windsor* v. *McVeigh*, 93 U.S. 274, where land had been seized and the claimant was refused permission to appear on the ground that he was an enemy, the decree was held in a subsequent action of ejectment to be invalid. *Field*, J., said (p. 279),

"The *seizure* in a suit *in rem* only brings the property seized within the custody of the court and *informs the owner* of that fact. The theory of the law is that all property is in the possession of its owner, in person or by agent, and that its *seizure* will therefore operate to *impart notice* to him. Where notice is thus given the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognised and its exercise allowed before the court can proceed beyond the seizure to judgment."

In *Hollingsworth* v. *Barbour*, 4 Pet. 466, this Court concurred in and adopted (p. 470) the following language of *Trimble*, J., in the court below (p. 475),

"The course of proceeding in admiralty causes, and some other cases where the proceeding is strictly *in rem*, may be supposed to be exceptions to this rule [regarding the service of notice]. They are not properly exceptions. The law regards the *seizure of the thing* as constructive notice to the whole world; and all persons concerned in interest are considered as affected by this constructive notice. But if these cases do form an exception, the exception is confined to cases of the class already noticed, where the proceeding is strictly and properly *in rem*, and in which the thing condemned is first *seized* and taken into the custody of the court. The case under consideration is not properly a proceeding *in rem*; and a decree in chancery for the conveyance of land has never yet within my knowledge been held to come within the principle of proceedings *in rem*, so far as to dispense with the service of process on the party. *There is no seizure* nor taking into the custody of the court the land, so as to operate as constructive notice."

In order to avoid the necessity of giving the direct notice to persons interested that is required in a suit *against persons*, it must be shown that the proceedings for registration are strictly proceedings *in rem*, as suits in admiralty are, and then the seizure, which is the notice required in such proceedings, must be made. It is not enough to show that they are *quasi in rem* or *in the nature of* proceedings *in rem* as regards persons out of the reach of regular service, for that would only justify a substituted service on such persons. One of the things in which such proceedings differ from proceedings strictly *in rem*, is that citation even of non-resident defendants is necessary (*Freeman* v. *Alderson*, 119 U.S. p. 188).*

It is plain that the proceedings for registration are not strictly proceedings *in rem*. The land is not *seized*, and it is not proceeded against as the *defendant*. These distinguishing features of a regular suit *in rem* are entirely absent. As the land is not seized, the *notice* required in such proceedings, and implied from a seizure, is not given.

It cannot even be shown that the proceedings are *quasi in rem* as to persons upon whom actual service can be made, for the jurisdiction is never said to be *quasi in rem*, except when the jurisdiction of the *person* fails and the jurisdiction is limited to the *res*.

In *Cooper* v. *Reynolds*, 10 Wall. p. 318, where the property of a non-resident defendant had been attached, *Miller*, J., says,

"If the defendant appears, the cause becomes mainly a suit *in personam* with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff."

In *Freeman* v. *Alderson*, 119 U.S. p. 190, where a prior action had been brought to try the title to an undivided interest in land

---

*If a suit to quiet title or to recover specific property were sufficiently *in rem* to justify a judgment without actual notice, the same procedure might be applied to actions for debt or damages where an attachment of property is made, for the latter are as much *in rem* or *quasi in rem* as the former.

and to have partition, and a non-resident defendant had been cit by publication, *Field*, J., said,

"Such action, though dealing entirely with the realty, is not an acti *in rem* in the strict sense of the term; it is an action *against the part* named, and, though the recovery and partition of real estate are soug that does not change its character as *a personal action;* the judgm therein *binds only the parties* in their relation to the property."

The only supposed resemblance to an action *in rem* is the citati of all the world by advertisement in a newspaper. But this adv tisement has been employed only in modern actions *in rem* as additional precaution. It is not necessary for the validity of t proceedings, because the *seizure* is itself notice, and if the proce ings for *registration* were *really in rem*, both the notices advertis and those sent by mail would be unnecessary, so far as the requi ments of due process are concerned.

The publication of a citation in a newspaper was not original part of the process in a suit *in rem* in admiralty. The warra required the marshal to arrest the ship or cargo and to cite persons having or claiming an interest (Coote Adm. 194), and was served merely by "producing the original before the master a crew, and affixing a copy to the mast of the ship" (2 Browne Ci & Adm. L. 398; Coote Adm. 13; see also 2 Wheat. appx. 20 If there was no appearance in defence, the suit proceeded by defaul to a decree in the manner stated in 2 Browne Civ. & Adm. L. 399, a Coote Adm. 102. There was no publication in a newpaper in a of these proceedings, even if such publication was then practicabl Advertisement in a newspaper was required by a U.S. statute certain revenue cases (1799, c. 22, s. 89 (1 Sts. 696)), and th requirement was afterwards extended by rules of court to suits admiralty (see Dist. Court (N.Y.) rule 46 in Betts Pr. (183 appx. p. 14, which refers to that statute, and the present U. Adm. rule 9, adopted in 1844, 3 How. v). It is to be inferred fro the language of *Marshall*, C. J., in *Mankin* v. *Chandler*, 2 Broc 127; 16 Fed. Cas. 626 (*supra*, p. 31) that at that time (182 such advertisement was not generally used in admiralty. In En land it is only used for notices of sale upon default, and it w

first required in such cases by the new rules of 1859 (2 Pritchard's Dig. 534, 536; Wms. & Bruce Adm. 204, appx. p. xxix, rule 19).

In the proceedings for registration, the *defendants* are the persons claiming adverse interests in the land, and the purpose of the proceedings is to exclude them from the interests they claim. The act requires that they be named, if known (s. 31, form), and, whether they are named or not, they are made defendants by the description, "whom it may concern" (s. 35). The proceedings are directed against them just as any suit to quiet the title would be, and the decree quiets and confirms the title of the applicant conclusively against them (s. 38). These are no more strict proceedings *in rem* than any other suit to quiet title is.

DECLARATIONS IN THE ACT AS TO NATURE OF THE PROCEEDINGS.

The act shows on its face that the difficulty of making the decree conclusive against persons that have no notice was to some extent foreseen. The attempt was made to overcome the difficulty by giving to the proceedings the effect of a suit *in rem* in admiralty. It was assumed that the legislature might by changing the form of proceeding dispense with the notice that the Constitution would require if the proceeding were *against persons*.

It is provided (s. 38) that the decree "shall *bind the land* and quiet the title thereto." This would have been sufficient to justify substituted service on persons out of the jurisdiction, but the proceedings do not thereby become strict proceedings *in rem*. The judgment or decree always binds the *property* in proceedings *quasi in rem*. It was not necessary even to go so far in order to give this effect to the decree. The subsequent provision (s. 38) that the decree "shall be *conclusive* upon and against all persons," would have been quite sufficient by itself to make the decree operate on the land (*Short* v. *Caldwell*, 155 Mass. 57). It is only when the decree requires the adverse claimant to do some act, such as bringing an action to try the title, that its effect is confined *to the person* (*Macomber* v. *Jaffray*, 4 Gray 82).

Also (s. 35) "by the description in the notice 'to all whom it may concern' *all the world* are made *parties defendant* and shall be con-

cluded." This phrase is taken from cases in admiralty, where it means, as it does here, all persons that have an interest, and, by the express terms of the act, only persons claiming an interest are allowed to appear (s. 34). There are only two ways of making all such persons defendants. One is by proceeding directly against them personally. The other is by proceeding against the property, which is in effect proceeding against all persons interested in it.* According to the historical account by *Jeune*, J., in *The Dictator*, [1892] P. D. pp. 311–313, the action *in rem* originated in the arrest of the *res* to compel the appearance of the defendant, and later, as the idea of a maritime lien developed, the arrest became the distinctive feature, having for its primary object the satisfaction of the creditor out of the property. The proceeding prescribed by the act is not *against the property* and therefore is not strictly *in rem*.

In s. 2, as amended 1899, c. 131, s. 1, it is provided, "The proceedings upon such applications *shall be* proceedings *in rem*, and the decrees shall *operate directly on* the land and *vest and establish title* thereto." The first part of this amendment was an attempt to change the *character* of the proceedings without making any change in the proceedings themselves. It has as much effect, and no more, than if it were provided that the proceedings in an action of ejectment or upon a writ of entry, or in a suit to quiet title, should continue to be the same as before, but that those proceedings should be proceedings *in rem*. That would not change their nature, though it might be necessary afterwards to call them by their statutory name. The rest of the amendment adds nothing to the provision (s. 38) already mentioned, that the decree shall *bind the land* and *quiet the title*.

The Ohio act contained a similar provision (s. 81), that the decree "shall be in the nature of a decree *in rem* and shall be final and conclusive as against the right of every and all persons, known and unknown," &c. (92 Ohio Laws, p. 239).

---

* See the quotations, *ante*, p. 31–32, from *The Mary*, 9 Cranch. p. 144, and *Scott* v. *McNeal*, 154 U.S. p. 46.

DECISIONS AS TO NATURE OF THE PROCEEDINGS.

In *Brown* v. *Levee Commissioners*, 50 Miss. p. 486 (*supra*, p. 14), where it was proposed by similar proceedings to conclude all persons claiming an interest in lands that had been sold for taxes, the court said,

"The statute was framed on the idea that, because the act of 1865 impressed upon the land a lien for the taxes, it was competent to give a remedy in the nature of a suit *in rem*. The lien was given to make the demands of the levee board paramount to all encumbrances which the taxpayers could impose or suffer on their property. But if the suits were merely dependent for their support on the liens, it did not thereby become a 'proceeding *in rem*' any more than would *detinue*, *replevin*, or *foreclosure suits* of mortgages or other liens."

In *Bardwell* v. *Collins*, 44 Minn. 97 (*supra*, p. 15), where a statute had assumed to authorise a judgment in an action to foreclose a mortgage or to enforce a lien on real estate, without service of process except by publication, the court considered the nature of the action, as follows (p. 101),

"It is not an action *in rem*, but an action *in personam*. It is true it has for its object certain specific real property against which it is sought to enforce the lien of the mortgage, and in that sense it partakes somewhat of the nature of a proceeding *in rem*, but not differently or in any other sense than do actions in ejectment, replevin, for specific performance of a contract to convey, *to determine adverse claims to real estate*, and the like. The rights and equities of all parties interested in the mortgaged premises are to be adjusted in the action, which proceeds, not against the *property*, but against the *persons*, and the judgment binds only those who are parties to the suit and those in privity with them."

In *State* v. *Guilbert*, 56 Ohio St. 575 (*supra*, p. 18), the proceedings for registration were in substance the same as those prescribed in the Massachusetts act, and it was necessary for the court to consider whether they might be supported as proceedings *in rem*. The judgment on this point was as follows (p. 618):

"Whether it is *in rem* or *in personam* is determined by its nature and purpose. To say that the legislature may prescribe such notice as is appropriate to proceedings *in rem*, and thus invest the proceedings with

that character, is to affirm its power to annul the constitutional requirement. In this aspect of the case, and considering the effect of registration upon interests adverse to those of the applicant, the proceeding to register does not, in any substantial respect, differ from a suit *quia timet* to settle title. It bears the least possible analogy to a proceeding *in rem*. The *res* is not taken into the possession of an officer of the court. No charge or lien is asserted against it. It is not to be sold with a view to the distribution of its proceeds, and it partakes therefore less of the nature of a proceeding *in rem* than does the foreclosure of a mortgage. The land is not a thing of shifting situs like a ship, against which obligations may accrue to-day in one jurisdiction and to-morrow in another. The status of the land is not changed by registration. The substantial thing determined by registration is that the person who makes the application has a right of property in the land to the exclusion of all other persons. The judicial force of the proceeding is wholly expended in a conclusive determination of the rights of persons in the land. Except when the land is occupied by one who claims adversely to the application, the questions determined in the registration are such as both before and since the adoption of the Constitution have been determined by courts of equity, and their decrees much more distinctly than the judgments of courts of law operate upon persons."

GROUNDS OF THE OPINION OF HOLMES, C.J.

Holmes, C.J., speaking for himself, but not for the majority of the court below, maintains the validity of the notice provided by the act on the ground that the proceedings are *in rem*, and this is the subject chiefly discussed in his opinion. At p. 35 of the Transcript, he says:

"But it is said that this is not a proceeding *in rem*. It is certain that no phrase has been more misused. In the past it has had little more significance than that the right alleged to have been violated was a right *in rem*. Austin thinks it necessary to quote Leibnitz for the sufficiently obvious remark that every right to restitution is a right *in personam*. So as to actions. If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally in theory at least binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence, the action is *in personam*, although it may concern the right to or possession of a tangible thing. *Mankin* v. *Chandler*, 2 Brock. 125, 127. If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any

sort against the right sought to be established, and if any one in the world has a right to be heard on the strength of alleging facts which, if true, show an inconsistent interest, the proceeding is *in rem*. 2 Freeman, Judgments, 4th ed. s. 606, *ad fin.* All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected."

This statement of the difference between an action *in rem* and an action *in personam* is not supported by any authority, and it does not agree with what has been laid down by judges of this Court in the cases above mentioned. It leaves out of account entirely what they have called the distinguishing feature of an action *in rem*. If it is sound, it may be sufficient to justify the absence of the notice that would be required in actions *in personam*, but it is not sufficient to dispense also with the notice required in actions *in rem*. This notice is given by *seizure of the thing*, but in these proceedings there is no seizure. It is said in the opinion that "except as security against escape, seizure is a mere form, of no especial sanctity, and of much possible inconvenience" (*Trans.* p. 36), but what is supposed to take its place as *notice* is nowhere stated.

According to the test so asserted, the case of *Brown* v. *Levee Commissioners*, 50 Miss. 468 (*ante*, pp. 14, 39) was wrongly decided, for the suit, being instituted against all persons having or claiming any interest, was *in rem*, and that case, instead of being commended by this Court in *Hurtado* v. *California*, 110 U.S. p. 536, as "a well-considered case," ought to have been condemned as a misapplication of constitutional principles. On the other hand, tried by the same test, *Bardwell* v. *Collins*, 44 Minn. 97 (*ante*, pp. 15, 39) which followed the rules laid down in that case, was nevertheless rightly decided, because it was directed against a defendant, Collins, by name, and was therefore *in personam*. But if Collins's name had not been mentioned, and judgment had been claimed against all persons interested, the proceeding would have been *in rem*; and, although he was in reality the only person interested and the only one to be affected by the judgment, it would not have been necessary to give him any notice otherwise than by the notice that was published in the newspaper. In this manner every kind of action, in which property is claimed, might be transformed into a strict suit *in rem*,

simply by omitting the names of the defendants and claiming the property against whom it may concern.

But this attempted distinction between an action *in rem* and an action *in personam* cannot be supported. There is no form of action that really goes against persons generally. Even as regards suits in admiralty, in which it is said that "all the world" are defendants, a qualification is understood by which "all the world" is limited to such of the world as have or claim to have an interest. This appears from what is said in *The Mary*, 9 Cranch p. 144, and *Scott* v. *McNeal*, 154 U.S. p. 46 (*supra*, pp. 31–32).

The defendants are just as determinate as if they were mentioned by name. The number is not increased by giving them an indefinite description, instead of specifying their names. No other persons can make themselves parties or are bound by the judgment.

Austin shows that *all rights of action* are rights against *determinate* persons. He explains that the phrase *in personam*, in the sense in which it is used in Roman law and jurisprudence, refers, not to persons generally, but to *determinate* persons, while the phrase *in rem* signifies *generality*, and does not mean "against the thing," as it does in English law when it is applied to suits in admiralty. Accordingly a right of action cannot be a right *in rem* in that sense; for, he says, it is evident that such a right can exist only against the particular persons from whose acts the right has arisen. But certain actions for *restitution*, as distinguished from actions for *satisfaction* in damages, were called *actions in rem*, and the important point that he impresses upon his hearers, lest they may be misled by this use of the phrase, is that such actions, as well as all others, are actions against particular or *determinate* persons. In his Lectures (4th ed. 1879) at p. 388, he says,

> "All rights founded upon injuries, or *rights of action* in the largest sense of the word, are rights *in personam*, equally with those which arise from contracts: and, like all rights *in personam*, are rights to acts or forbearances on the part of *determinate* persons, and to nothing more."

A few pages further back (p. 380), he explains the meaning of the phrases *in rem* and *in personam:* —

"At present, I will merely point at an ambiguity which perplexes and obscures the import of *jus in rem*.

"The phrase *in rem* denotes the *compass* and not the *subject* of the right. It denotes that the right in question avails against *persons generally*, and *not* that the right in question is a right over a *thing*. For, as I shall show hereafter, many of the rights, which are *jura* or rights *in rem*, are either rights over, or to, *persons*, or have *no* subject (person or thing).*

"The phrase *in personam* is an elliptical or abridged expression for 'in personam *certam* sive *determinatam*.' Like the phrase *in rem*, it denotes the *compass* of the right. It denotes that the right avails *exclusively* against a *determinate* person, or against *determinate* persons."

After the passage first above quoted, he proceeds, p. 388,

"Some confusion has arisen upon this point from the *actio in rem* of the Roman lawyers. . . .

"All rights of action must, it is evident, be founded on rights *in personam*, that is, on rights which avail exclusively against the determinate person or persons against whom the action will lie, although those persons may have been brought under that designation by committing an offence against a right *in rem*. *Actions in rem* are rights of action founded on an offence against a right *in rem* and seeking the *restitution* of the party to the enjoyment of that very right, and *not merely satisfaction* for being deprived of it. Thus an action of *ejectment* in English law would be said by the Roman lawyers to be an action *in rem*, because it is founded upon an act of dispossession infringing upon my right of ownership in the land, and because it seeks the restoration to me of that specific right. So likewise an action of *detinue* would be called an action *in rem:* but an action of *trover* would not; because, though founded upon the supposition of a wrongful conversion of the subject claimed to the defendant's use, it does not seek specific restitution, but merely satisfaction or damages." †

The same subject is mentioned again in a note at p. 968,

---

* *E. g.* rights to personal safety and freedom, reputation, immunity from damage by fraud. Holland, Jurisprudence (1st ed. 1880) 109.

† So a *suit in equity* for recovery of specific chattels, or for an injunction against the erection or maintenance of a building obstructing a right of way or light and air, would be called an *action in rem* in the Roman law, although equity is said especially to operate *in personam* upon the parties (*Massie* v. *Watts*, 6 Cranch 148; *Cole* v. *Cunningham*, 133 U.S. 107, 117-119). But a *suit in admiralty* against a ship for damages caused by a collision would *not* be called an action *in rem*, because it only seeks satisfaction in damages.

"(d) *Rights of Action*, with all other rights founded upon *injuries*, are also *jura in personam*. For they answer to obligations attaching upon the *determinate* persons, from whom the injuries have proceeded, or from whom they are to be apprehended.

"It is true that difficulties have arisen about the nature of Actions *in rem*; i. e. those Actions (or, rather those Rights of Action) of which the *ground* is an offence against a right *in rem*, and of which the *intention* (scope, or purpose) is the *restitution* of the injured party to the exercise of the violated right. But these and other difficulties besetting the Theory of Actions, appear to have sprung from this: that the nature of the right which is affected by the injury, and the nature of the remedy which is the purpose of the action, are frequently blended and compounded by expositors of the Roman law. . . .

"To pursue this subject further were inconsistent with my present purpose. But before I dismiss it, I will advert to an important remark made (I think) by Leibnitz — Every right to *restitution* is a right *in personam*. . . ."

These quotations from Austin show that jurisprudence furnishes no ground for contending that the question whether the proceeding is an action *in rem*, depends on the number of persons affected by it. It is clear that there is no connection between an action *in rem* in the English sense and an action *in rem* in the Roman sense. The Latin words *in rem*, applied to an action in the English sense, are used to express a purely English notion, as other Latin words are often used in English law. They mean literally that the action is in form directed *against the thing* as the defendant. When they are used to describe the judgment in such an action, they have the same literal meaning, namely, that the judgment is *against the thing*. The persons that are affected by the judgment are those that claim an interest in *the thing*, and no others, whether the number is large or small. According to the historical account given by *Jeune*, J., in *The Dictator*, 1892, P.D. pp. 311–313 (*supra*, p. 38), this kind of action appears to have had an English origin.

JUDGMENTS IN REM IN PROCEEDINGS THAT ARE NOT IN REM.

Certain judgments in other proceedings, not proceedings *in rem*, are also called, in English and American law, *judgments in rem*. The chief instances of such judgments are the judgments of ecclesiastical

or other courts having jurisdiction in matrimonial causes. The proceedings in these cases are *inter partes*, but the judgments are conclusive adjudications of the status of the parties and bind all the world (2 Sm. L.C. (6th ed.) 699, 714; (8th ed.) 810, 828).* The manner in which the interests of other persons, not parties, may be affected by such judgments, is shown by *Bunting's Case*, 4 Rep. 29, and *Kenn's Case*, 7 Rep. 42. Decrees appointing guardians for persons found to be of unsound mind are another instance (*Leonard* v. *Leonard*, 14 Pick. p. 283). Actual notice of the proceedings is given to a respondent within the jurisdiction, and it is not likely anybody would suggest that an advertisement in a newspaper could be properly substituted for actual notice in such a case. Although the phrase *in rem* is applied to such *judgments*, it is never applied to the *proceedings* in which they are obtained. It is evident that the phrase cannot have the same literal meaning with reference to these judgments, as when a judgment in admiralty against a ship is called a judgment *in rem*.

Austin says that this manner of applying the phrase *in rem* is manifestly borrowed from the Roman lawyers, for it is analogous to the manner in which they employ it in their writings; and he explains that, when they use the phrase, they always intend a something which avails generally or universally: in favor of a *determinate* person against persons *indeterminate;* or in favor of *indeterminate* persons

---

*It is sometimes said that the object of the proceedings for registration is to ascertain the *status* or condition of the land as to title, as if that would authorise a conclusive decree without actual notice. But this is only another form of saying that the object is *to try the title*, and in actions for that purpose actual notice is required. The only way in which registration can change or affect the *status* of the land, is by adjudging that *the title* is in the applicant and excluding the claims of the defendants, as is done in any suit to quiet title. It may be doubted whether the term *status* can be properly applied to *title*. It is generally applied only to persons. Austin says that the only meaning he can possibly attach to it, is "a set of rights and duties, specially regarding *persons* of a given class, which for the sake of convenient arrangement, it is expedient to detach from the body of the legal system" (Jurisprudence, 4th ed., 742). It will be difficult to find an instance in which proceedings to determine a *status* can be maintained without other notice to the persons interested than an advertisement, where it is practicable to give other notice.

against a person *determinate*. How the phrase *in rem* came to acquire this meaning, he says, it is difficult to perceive; it is an elliptical expression, and it might be possible to restore the links, to connect *res* (as signifying a *thing*) with *in rem* (as signifying *generality*) but he does not undertake to do it. (Jurisprudence (4th ed. 1879) p. 990–991.)

The Roman lawyers however do not appear to have applied the phrase *in rem* to *judgments*. Savigny speaks of judgments that conclude persons not parties to the action or their privies, as judgments that establish *jus inter omnes*, and says they are exceptions to the general rule that a judgment establishes *jus inter partes*. The same extension of the effect of the judgment, he says, is expressed by *judex jus facit*, referring to the Digest for instances. The few cases, to which the exception applies, appear to relate chiefly to personal status, the right of succession, and the validity of testaments, and to a certain extent to sureties (Savigny, Droit Romain (Paris, 1849), vol. 6, pp. 478–484). But the expression *judgment in rem* is not used.

TWO DIFFERENT KINDS OF JUDGMENT IN REM.

The result seems to be that the English lawyers use the phrase *in rem* in regard to *judgments* in two distinct senses, having no relation to one another. One is the literal sense of the English words, *against the thing;* in this sense it is applied to a judgment in an action *in rem* in admiralty, which binds *the thing* itself and thereby the rights of the persons interested in it, and they are deemed to be constructively *parties* to the action. The other is the Roman sense of *generality*, in which it is applied to judgments in certain proceedings *inter partes*, where not only the parties, but all other persons, are bound by the judgment. No definition of *judgment in rem* can be stated that will include these two different meanings. It is not admissible to argue from the fact that judgment is recovered in one of these cases by a proceeding *in rem*, that the *proceeding* is therefore *in rem* in every case where a judgment *in rem* is recovered. Still less is it admissible to argue that the proceeding is *in rem* whenever the legislature declares that the judgment shall be conclusive on all persons interested whether they have notice or not.

PROBATE AND ADMINISTRATION.

Grants of *Probate* and of *Administration* are not strictly judgments *in rem*, but they are said to be *in the nature of* judgments *in rem*, for they actually invest the executor or administrator with that character and are conclusive against all the world (2 Sm. L.C. (6th ed.) 713; (8th ed.) 827). But the term *in rem* is not applied to the *proceedings* in which probate or administration is obtained.

The probate or administration does not depend for its effect on any *notice* that may have been given of the application. It has the same effect although it is granted without any previous notice of any kind (*Waters* v. *Stickney*, 12 Allen p. 4) or, according to a common form practice, upon mere production of a will purporting to be regularly executed and an affidavit of the executor, without further evidence (1 Wms. Ex. (8th ed.) 332, 334). It is also to be observed that the absence of a probate is just as conclusive against a will in any court, except the probate court, as a probate would be in its favor (1 Wms. Ex. 297).

The conclusive effect of such proceedings is however limited to such other courts, and appears to be due to the exclusive jurisdiction of the probate courts, which will revoke the grant in a proper case, even where a will has been proved in solemn form (*Waters* v. *Stickney*, 12 Allen 1, 4). In proceedings in England for probate in solemn form, the citation is addressed to the defendants by name, and is served upon them personally, when practicable (Coote, Prob. Pr. (6th ed.) 262, 466 form), and the proceedings are *inter partes* (see *Kennaway* v. *Kennaway*, 1 P.D. 148; Coote, Pr. 251, 255). Such probate is generally irrevocable as against all persons so cited or cognisant of the proceedings (Coote, Pr. 251). In our proceedings for probate in Massachusetts, the defendants are described as the heirs at law, next of kin, and other persons interested, but the proceedings are none the less against them personally, and, if there is a contest, are entitled and conducted as other suits *inter partes*.

But, although the probate of a will is not final and irrevocable, there is no reason why it might not be made so by statute without violating the Constitution. When a man dies, his property passes

from him and goes to such persons or in such manner as the st
has designated (*U.S.* v. *Perkins*, 163 U.S. p. 628). The st
has the same power to determine the manner in which the n
owners shall be ascertained as to designate who they shall be.
statute providing that the probate of a will, proved after a gener
notice published in a newspaper or posted in a public place, shou
be irrevocable, would not deprive the heirs or next of kin of th
property, for the property of the deceased owner would never ha
become theirs. It would have passed from him to the perso
designated by the statute to succeed to his property. A statu
might provide that in case of intestacy the heirs or next of k
should be ascertained by similar proceedings. Some of the heirs
next of kin might, from want of notice, lose the opportunity of di
puting the will or of asserting their claims as heirs or next of ki
but they would not be deprived of their property. The state is n
bound to give the property to a class of unascertained persons wit
out any means of determining whether there are any such perso
or who answer the description. It may properly provide that th
property shall go to such persons as shall be ascertained in a sum
mary manner prescribed by statute to be the persons answering
certain description, and only the persons so ascertained will acquir
any interest in the property.

ESCHEATS.

This principle has been applied in the case of proceedings t
determine whether the state is entitled by *Escheat*. Such a pro
ceeding is often said to be *in rem* in a qualified sense, or, as
expressed in the language quoted in *Hamilton* v. *Brown*, 161
U.S. p. 269, "The proceeding, while not strictly a proceeding *in*
rem, has many of its characteristics." At common law it was had
by inquest of office, and a finding in favor of the king was not abso
lutely conclusive, for the facts found in his favor might afterward
be traversed as mentioned in *Hamilton* v. *Brown*, 161 U.S. p. 263.
But a statute providing for a *final determination*, after notice to all
known claimants and a general notice by advertisement, is valid, on
the same principle as provisions for ascertaining the next of kin
entitled to share in the distribution. In the judgment of this Court

in *Hamilton* v. *Brown*, where the subject was elaborately considered, the grounds were stated as follows (161 U.S. p. 268): —

"But the whole object in proceedings for escheat, as in proceedings of administration, is to ascertain who are entitled to the estate of a deceased person; in proceedings of administration, to distribute the assets, after payment of debts, among those who come forward and prove themselves to be next of kin; in proceedings for escheat, to ascertain and determine, once for all, so far as concerns the title in the land itself, whether the former owner left no heirs or devisees, that being the single question on which depends the issue whether or not the land has escheated to the state."

And in conclusion, at p. 275, "When a man dies, the legislature is under no constitutional obligation to leave the title to his property, real or personal, in abeyance for an indefinite period; but it may provide for promptly ascertaining, by appropriate judicial proceedings, who has succeeded to his estate. If such proceedings are had, after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the state, as by inquest of office or similar process to determine whether the estate has escheated to the public, is due process of law; and a statute providing for such proceedings and determination does not impair the obligation of any contract contained in the grant under which the former owner held, whether that grant was from the state or from a private person."

No such principle is applicable to cases like the present, where the object of the proceeding is to adjudicate upon rights that have already vested under laws existing at the time. If persons having such rights are concluded by a decree in favor of the applicant, they are deprived of their property.

WRITS OF RIGHT AND FINES.

The proceedings anciently had upon *Writs of Right* and *Fines* are spoken of by *Holmes*, C.J., "*as standing half way* between statutes of limitations and true judgments *in rem*" (*Trans.* p. 33); the effect of a judgment upon a writ of right and the lapse of a year and a day being to bar the rights of strangers who did not make claim within that time, unless they were under disability or beyond sea;

and a fine having a similar effect, afterwards modified by the statu
mentioned in 2 Bl. Com. 354.

A *writ of right* is taken by *Marshall*, C.J., as an example of
kind of proceedings that are plainly not *in rem* (*Mankin* v. *Chandl*
2 Brock. p. 127; 16 Fed. Cas. p. 626; *supra*, p. 31).

In the court below, *Loring*, J., points out that the rights
strangers were barred in writs of right and fines, not by the jud
ment, but by the lapse of the year and a day, and that the princi
was the same as that of statutes of limitations (*Trans.* p. 46).

It also appears from the marginal note in Booth on Real Actio
p. 101, cited by *Holmes*, C.J., as to writs of right, that the ye
and day ran, not from the judgment, but from *execution*. And
Stowel's Case, Plowd. 357 b, it is said, quoting *Herle*, that

"in these cases of a recovery in a writ of right, and also upon a fine exec
tory levied, the recovery and the fine ought to be executed by entry
execution by suit, for transmutation of *the possession* is a part of noti
to strangers, and gives them an opportunity of bringing their action, or
making their entry within the year and day afterwards, and unless the r
covery or fine be executed, *none shall be barred* by non-claim."

In Pollock & Maitland's History of English Law (1895, vol. 2
p. 75), it is said, regarding writs of right,

"Next we must observe that the judgment in this action will *not* pre
clude a third person from claiming the land. The judgment, if it b
followed by inaction on his part for some brief period — ultimately yea
and day was the time allowed him — may preclude him, should he be i
this country and under no disability; but *the judgment itself is no bar.*

And in a note is added, "The exception against him will be, not *excepti
rei judicatæ*, but *exceptio ex taciturnitate*."

Further on, at p. 101, it is said, "but just as when there had been judg
ment on a writ of right, the fateful year and day did not start until seisi
had been delivered by the sheriff to the victorious demandant, so when
fine was levied, it was often necessary that a writ of seisin should b
sued out and that seisin should be delivered. Seisin under the order o
the king's court, seisin under the king's ban, — it is this rather than th
mere compromise of an action that, if we look far enough back, seems th
cause of preclusion."

The injustice of barring the claims of remaindermen and reversioners by non-claim before their rights accrued led to the passage of the 34 Ed. 3, c. 16 (*Stowel's Case*, Plowd. 359, 360), by which the effect of non-claim in the case of fines was abolished; and when it was revived by the 4 Hen. 7, c. 24, the time allowed for making claims was enlarged to five years after proclamations, and a further time was allowed to persons under disability or beyond seas and those whose rights accrued afterwards (3 Rep .(ed. 1826) p. 231, note).

Fines were never in use in Massachusetts (*Fowler* v. *Shearer*, 7 Mass. p. 20, by *Parsons*, C.J.).

These proceedings did not in any way approach judgments *in rem*, for they were entirely proceedings between the parties, and strangers were not bound by the judgment. If they had been, they could not have entered on the land, or asserted any claim contrary to the judgment. In the writ of right, the only question determined was whether the demandant or the tenant had a better title than the other (3 Bl. Com. 195–196; 2 Pol. & Mait. Eng. Law, 75). The fine was only the result of the agreement between the parties (2 Bl. Com. 349–351). Other persons were as free to assert their rights as they were before, provided that they did so within the time allowed by law for that purpose.

The validity of statutes limiting the time within which rights may be enforced has always been maintained by this Court, where the time allowed is reasonable in the circumstances. Their validity is maintained on the ground, not that the right is taken away by due process of law, but that the party had neither an unrestricted right to sue, nor a vested right in a particular limitation (*Terry* v. *Anderson*, 95 U.S. p. 633), and that no vested right is impaired (*Christmas* v. *Russell*, 5 Wall. p. 300; *Vance* v. *Vance*, 108 U.S. p. 517–18). The restricted right given by law is lost if it is not exercised within the time limited for the purpose.

Wheeler v. *Jackson*, 137 U.S. pp. 255, 257–8.

Turner v. *New York*, 168 U.S. 90, 94.

Saranac Land Co. v. *Comptroller of New York*, 177 U.S. 318.

WHAT NOTICE IS RELIED ON IF PROCEEDINGS ARE IN REM.

But if the proceedings for registration are treated as a suit *in rem*, it is not clear what is relied on as sufficient notice to persons adversely interested.

The notice inferred from *seizure* of the *res* in regular suits *in rem*, is not given, for there is no seizure.

It seems to be conceded that *advertisement* is not the effective part of process *in rem* (*Trans.* p. 34), and notice has never been inferred from it where it did not actually reach the persons interested. Advertisement might therefore have been dispensed with, as well as personal service, if the notice required in regular suits *in rem* was given.

What then remains, when seizure, personal service, and advertisement are dispensed with? It is said (*Trans.* p. 37), "Notice is to be *posted on the land* just as admiralty process is *fixed to the mast.*" But it is hardly conceivable that a copy of a warrant affixed to the mast of a ship, without any seizure of the ship, would be considered a sufficient notice, even if the rules of court or statutes attempted to make it sufficient to support proceedings *in rem*. The courts have stated what it is that gives jurisdiction against a ship *in rem*, but affixing the copy to the mast has never been mentioned as sufficient. That is evidently done for the purpose of showing the character of the seizure, and it is an act of the same nature as producing the warrant before the master and crew (*ante*, p. 36). It seems hardly possible that a notice posted on a tree in a field or forest should be thought a sufficient notice of proceedings to try the title to the land against all persons claiming an interest.

POWER OF STATES TO DISPENSE WITH NOTICE BY CHANGE OF FORM FROM SUIT IN PERSONAM TO SUIT IN REM.

5. It is also submitted that the legislature has not the power, by changing the form of proceeding from that of a suit *in personam* to that of a suit *in rem*, to avoid the necessity of giving the actual

notice required by the Constitution in proceedings *in personam* to determine the rights of persons in property.

A majority of the court below seem to have been of this opinion (*Trans.* p. 37).

Upon this subject, the court in *Brown* v. *Levee Commissioners*, 50 Miss. p. 486-7, said : —

"It is ultra vires of the legislature to break down the essential and fundamental distinctions and differences which have always existed in the nature of judicial processes. . . .

"Our jurisprudence has always regarded suits to recover chattels or to foreclose a mortgage as personal suits, entitling the defendants to personal notice. If the legislature should enact that hereafter *they shall be* proceedings *in rem*, and that the seizure of the horse or other effects, or of the mortgaged premises, shall confer jurisdiction and operate as constructive notice, it would be too plain for argument that the legislature was without power to thus uproot and turn aside the 'due course of law.'"

In *Bardwell* v. *Collins*, 44 Minn. p. 102, the court said : —

"Although the legislature may at its pleasure provide new remedies or change old ones, the power is nevertheless subject to the condition that it cannot remove certain ancient landmarks or take away certain fundamental rights which have been always recognised and observed in judicial procedures. Hence it becomes important, in determining what kind of notice would constitute 'due process of law' in any judicial proceeding affecting a man's property, to ascertain what notice has always been required and deemed essentially necessary in actions or proceedings of that kind, according to that system of jurisprudence of which ours is derivative."

In *State* v. *Guilbert*, 56 Ohio St. p. 618, where the validity of the Ohio registration of title act was under consideration, the following language was used : —

"To say that the legislature may prescribe such notice as is appropriate to proceedings *in rem* and thus invest the proceedings with that character, is to affirm its power to annul the constitutional requirement."

Loring, J , in the court below, shows one of the consequences of admitting the power of the legislature to produce such an effect by this change of form (*Trans.* p. 53), as follows : —

"In stating that the test, and the only test, as to whether a particular proceeding is or is not a proceeding *in rem*, is this, 'Are all the world barred?' the Chief Justice tacitly recognises, that, if this proceeding is upheld as a proceeding *in rem*, it is within the constitutional power of the legislature to provide that any property within the territorial limits of the Commonwealth, real or personal, corporeal or incorporeal, may be recovered, or any titles therein or lien thereon established, in a proceeding in which no defendant need be named, and no notice need be given except notice by publication."

This is what the Supreme Court of Mississippi thought it was too plain for argument that the legislature was without power to do. (*Brown* v. *Levee Commissioners*, 50 Miss. p. 487, *supra* p. 63).

It may be added that, if this could be done, the same procedure might be applied to any action for debt or damages where property is attached to answer the judgment. The attachment creates a lien, and the action would be in substance an action to subject the property attached to satisfaction of the claim. The only process required would be a published notice to all persons interested (whether within or without the state) to show cause why it should not be so applied.

The validity of proceedings in admiralty directly against a ship, or things connected with it, without direct notice to persons adversely interested, rests upon a settled practice that existed and was sanctioned by custom long before the Constitution.

This establishes its character as due process of law, according to the rule of *Murray* v. *Hoboken Land Co.*, 18 How. 272, 276-7.

But it does not warrant the extension of the practice to other subjects where according to the usual course of the common law such a practice was not admitted, and would not be consistent with fundamental notions of justice (*Hurtado* v. *California*, 110 U.S. pp. 528, 537).

In *Murray* v. *Hoboken Land Co.*, 18 How. 272, it was held that a warrant of distress issued against the property of a collector of customs for a balance found due from him on the auditing of his accounts by an executive officer, without any judicial proceedings,

was due process of law. *Curtis*, J., showed that a diversity in the law of the land between public defaulters and ordinary debtors had long been recognised and understood, and that some summary means of enforcing payment of balances due from receivers of public money had been in use from early times (p. 278); and, having regard to the settled usages and modes of proceeding existing in the common and statute law of England prior to the emigration of our ancestors and in the laws of several of the states, the proceedings by which the warrant was issued could not be denied to be due process of law (pp. 277, 280). But it was clearly pointed out that a similar course of proceeding would not be admissible in the case of ordinary debtors, and that Congress could not withdraw the question of their liability from judicial cognisance (p. 284).

Proceedings *in rem* by the government for the condemnation of enemy's property, or of property seized for violation of the revenue or other laws, have also been in use from remote times. In the exercise of the powers of government, a more summary process is justified than is permitted to individuals in asserting their private rights. Such process is due process of law and is sanctioned by ancient usage. The rights enforced in such cases are of a different nature from any that can belong to individuals, and the difference justifies the use of a different process. It is not necessary to resort to the supposition of *Holmes*, J., in *Com.* v. *Intoxicating Liquors*, 163 Mass. p. 43, that the law treats the thing "*as being itself a subject, and as liable to offend.*" (In that case the offence of which the liquors would have been guilty was that of being kept with an intention to sell). The owner has positive duties to the government in respect of his property (*Huling* v. *Kaw Valley Ry. Co.*, 130 U.S. p. 563), and the justification of a summary course of proceeding where they are violated is found in *Murray* v. *Hoboken Land Co.*, 18 How. 272. The use of regular proceedings *in rem* to enforce these peculiar rights of government accordingly affords no analogy for authorising similar proceedings to enforce the claims of individuals. It does not even furnish a ground upon which the government might be justified in employing such proceedings to enforce its own

rights as the owner of property, where its rights are of the same nature as those of an individual.

In the case of ships and things connected with them, it is not improbable that there were reasons for allowing a course of procedure to grow up that was not consistent with the requirements of the law in other cases. Considering the manner in which the movements of property of that kind are watched and how notorious any change of possession is, it is probable that the seizure generally has had the effect of actual notice.

But the same thing cannot be said in the case of other kinds of property, least of all, in the case of land, and it is certain that no such process has ever been used. As regards land especially, nobody can say that its actual seizure would be likely to come to the notice of the persons interested in the title. Possession of it is often only constructive and has no existence apart from the title, which it is said to follow (*Munroe* v. *Ward*, 4 Allen 150, 152). The title is subject to limitations under which several persons may be entitled to future or contingent estates without any interest in the possession until those estates arise. In such cases it is not even probable that a seizure would have the effect of notice; and in a proceeding for registration, if the applicant were in possession, as he ordinarily would be, it is almost certain that a seizure would not be notice to anybody but himself.

But even in admiralty, the injustice of proceeding without actual notice to the adverse parties, where the *title* or right of possession is to be tried between opposing claimants, is recognised, as mentioned by *Loring*, J. (*Trans.* p. 52), and actual notice is required. By Adm. rule 20, the process is by arrest of the ship and a monition to the adverse parties. In *Blanchard* v. *The Cavalier*, 3 Fed. Cas. 621; 38 Hunt Mer. Mag. 325, *Betts*, J., held that this constituted a proceeding *in personam* to be litigated between the parties individually, the vessel being placed under attachment only for the purpose of being adjudged to the party entitled.

In proceedings regarding taxes, and the taking of land by the right of eminent domain, and assessments for improvements, some

otice to the owner of property affected by the proceedings has been onsidered necessary, and a general advertisement is held to be fficient. These proceedings are sometimes said to be *in rem*, nd the use of the phrase is justified by the circumstance that ey are *against the property*. But they are not judicial proceedings nd furnish no analogy by which judicial proceedings may be conucted. The state has an absolute right to impose certain obligaons on property, and the owner must see to it that he is represented hen it is called into requisition and notice by publication given.

Hagar v. *Reclamation District*, 111 U.S. 701, 708.

Huling v. *Kaw Valley Ry. Co.*, 130 U.S. 559, 563.

Bauman v. *Ross*, 167 U.S. 548, 590.

In *State* v. *Guilbert*, 56 Ohio St. p. 622, regarding proceedings for egistration of title, the court said: —

"If it is borne in mind that the questions here considered concern the dversary rights of persons in property, it will sufficiently distinguish the ases which involve the police power, or the right of eminent domain, or he right of taxation."

In *Hagar* v. *Reclamation District*, 111 U.S. p. 708, this Court lso called attention to the distinction: —

"Undoubtedly where life and liberty are involved, due process requires hat there be a regular course of judicial proceedings, which imply that the arty to be affected shall have *notice* and an opportunity to be heard; so lso where *title* or *possession* of property is involved. But when the taking f property is in the enforcement of a *tax*, the proceeding is necessarily ess formal, and whether notice to him is at all necessary may depend upon he character of the tax, and the manner in which its amount is determinable."

Other Statutes and Cases alleged to be similar in Principle.

6. It has been urged that the principle of this act is the same as that of several other statutes that have been held to be valid by different courts, and that a great number of statutes depending upon

the same principle are in actual operation in many states without any question of their validity.

But it will be seen that these statutes, as well those that have been held to be valid, as those that have not been questioned, rest upon an entirely different principle, and that, while the principle contended for has been condemned in the several cases already mentioned, it has never received judicial approval except in the decision of the majority of the court below in this case.

(1) The Illinois statute called the *Burnt Records Act* has been referred to as an act authorising a decree that would conclude all persons interested, without any notice beyond a published notice addressed generally to all whom it may concern, and it has been asserted that the validity of such proceedings was established by the decision of this Court in *Gormley* v. *Clark*, 134 U.S. 338. But no such question was involved or alluded to in that case. The principal question was whether a case under this act could be brought in a United States court, and this was decided in the affirmative, as the case was in substance a suit in equity. This being decided and the parties being before the court, there was no reason why a decree should not be made that would bind them, even though a decree in some other case might not bind parties not properly served. It was not necessary for the successful working of that act in *any* case, that decrees under it should be beyond question in *all* cases. In the Illinois courts this act was upheld as to parties without notice, on the ground, not that the process was sufficient, but that it limited a time within which proceedings might be taken, the court saying: "The position taken that the Burnt Records Act is unconstitutional is not sustained. It is, in effect, *a statute of limitations*, and, under the circumstances, was not unreasonable" (*Bertrand* v. *Taylor*, 87 Ill. 235).

This act probably served as the model for the Illinois registration of title act (Illinois Laws 1897, p. 139) which depends for its effect upon the limitation of time, as against persons without notice, and not upon the conclusiveness of the decree. (*People* v. *Simon*, 176 Ill. 165; *ante*, p. 19.)

The bill pending in Congress (Senate 131) concerning land titles

in the District of Columbia, is the same as the Illinois act just mentioned, slightly altered to adapt it to the District of Columbia. The adaptation has not been completed, and some of the provisions of the bill (*e. g.* ss. 97, 100, 101) still refer to the municipal divisions, officers, and public securities of Illinois. The decision as to the validity of the Illinois act turned on s. 26, which is the same as s. 26 of the bill.

(2) The Massachusetts statutes concerning *Partition* provide that if any of the persons interested are *absent* from the state, or if the names of any of them are *unknown* to the petitioner, the court shall order notice to be given to them by publication or otherwise (P. S. c. 178, s. 9). It has never been determined that a judgment after notice by publication alone (s. 35) would be conclusive against persons resident in the state and *known* to the petitioner but not served with process, as to either their rights of property or the allotment of their undisputed shares.

The cases upon the statute involve no constitutional question. In *Cook* v. *Allen*, 2 Mass. 462, the question was whether a judgment in partition, under the statute then in force, bound one who claimed to hold in severalty and who did not appear, though *he had actual notice* (pp. 464, 471); and it was held that his right of *possession* was concluded, and that he could assert his right of *property* only by a writ of right (pp. 472–473). In *Dascomb* v. *Davis*, 5 Met. 335, the only question was whether the partition gave a right of possession sufficient to support an action of trespass. And in *Foster* v. *Abbot*, 8 Met. 596, where an attempt was made to attack a partition collaterally by writ of entry, on the ground that it was only against persons *unknown*, whereas the petitioner *knew* the parties in interest, and they had no notice, it was held that the effect of the alleged want of notice could not be decided in a collateral proceeding, and that the judgment in partition was valid until reversed on a writ of error. The case turned on a question of procedure and recognised the right of the plaintiffs to get rid of the judgment improperly obtained. Since the 14th Amendment such a judgment would probably be treated as void without the necessity of resorting to a writ of error (*Needham* v. *Thayer*, 147 Mass. 536).

The statutes do not profess to allow service merely by publication, except in the cases of *absent* and *unknown* parties, in which such service has been held admissible on the ground of necessity (*ante*, p. 11).

Even in the cases where such service is permitted by the statutes, the partition concludes absent parties only so far as the allotment of their shares is concerned, and not as to their right of property in any share or in severalty, and a time is prescribed within which parties out of the state can claim a new partition (P.S. c. 178, ss. 36, 38, 39, 41).

These statutes, and their origin and effect, are elaborately considered by *Loring*, J. (*Trans.* p. 54), and he shows that they do not affect the question in this case.

(3) The *Distribution of a Trust Fund* under the direction of the court is sometimes referred to as a case in which the courts determine the rights of persons interested after a general notice given only by publication. But the decree of the court, although it protects the trustee, does *not* conclude the rights of persons that are not actually reached by the advertisement, and they are at liberty to go against the parties that have received the fund under the decree.

Williams v. *Gibbes*, 17 How. 239, 254–257.

David v. *Frowd*, 1 M.& K. 200, 208–9.

Mohan v. *Broughton* [1900] P.D. 56, affirming [1899] P.D. 211.

2 Dan. Ch. P. (4th Am. ed.) 1206.

In *Williams* v. *Gibbes*, 17 How. p. 256, *Nelson*, J., speaking of the effect of a general notice by advertisement that does not reach the parties really entitled, quoted the remark of *Leach*, M.R., that

"it would be the height of injustice that the proceedings of the court, wisely adopted with a view to general convenience, should have the absolute effect of conclusively transferring the property of the true owners to one who has no right to it."

(4) In the court below a great many statutes of different states were referred to for the purpose of showing that provisions for binding persons by judicial proceedings without any notice otherwise than by publication in a newspaper, were common in many states,

and that their validity was thus generally recognised. But no one of these statutes made it possible to deprive any man of his property by such means, where he was a resident of the state and there was no obstacle to serving him with process in the usual way.

(*a*) By far the greater number of these statutes related to cases where the person was *unknown* and could not be ascertained with reasonable diligence, and in such cases notice by publication was allowed in substantially the same manner as where the defendant was out of the jurisdiction. The validity of notice by publication in such cases was recognised on the ground of necessity, in *Brown* v. *Levee Commissioners*, 50 Miss. p. 485, and *State* v. *Guilbert*, 56 Ohio St. p. 620, 621, but it was held that such publication was not valid notice where the necessity did not exist. The Minnesota statute, which was sustained in *Shepherd* v. *Ware*, 46 Minn. 174 (*supra*, p. 11), was in its terms the broadest of these statutes, but its effect and the validity of proceedings under it were strictly limited by the court. The Mississippi statute enforced in *Belcher* v. *Mhoon*, 47 Miss. 613, expressly required that "persons interested in such lands, *residing in this state*, shall be made parties *by name* and *served* with process, unless the complainant or complainants shall make affidavit that their names are *unknown;* and *non-residents* having claims to the lands shall also be made parties *by name*, and publication be made for them as in other cases in chancery, unless a like affidavit be made by the complainant or complainants that their names are *unknown*." None of these statutes or decisions gives any color for saying that a judgment obtained under them against *unknown* persons would bind persons that were in fact *known* or might by reasonable diligence be known.

(*b*) The Texas statute relating to *Escheats*, which was the subject of *Hamilton* v. *Brown*, 161 U.S. 256, and similar statutes of some other states, were also referred to. Such statutes and their relation to the questions involved in this case have already been considered (*supra*, p. 48).

(*c*) The statutes authorising courts in general terms to direct notice either by *personal service or by publication* do not empower them to dispense with personal service where it is practicable, and

to direct notice by publication alone in all cases. The provision as to publication is limited by implication to cases in which that mode of service is proper, in the same manner as a provision for notice to *non-resident* defendants was limited in *Roller* v. *Holly*, 176 U.S. 398, 406, to cases where suits may be properly instituted against non-residents. It is well known to be the practice of the courts to direct notice by publication only in such cases, and to require actual service where it is practicable.

(*d*) The statutes by which a judgment obtained after a published notice is made only *prima facie* evidence against parties not actually served, or (*e*) persons out of possession are excluded by a *limitation of time*, or (*f*) property is taken for public purposes by *taxation* or the right of *eminent domain*, do not require further consideration.

None of the statutes referred to assume to authorise a judgment against the title of any person to property without notice otherwise than by publication in any case where actual notice is practicable.

The statutes that have attempted to do this have been held to be unconstitutional in every case where they have come before the courts down to the decision of the court below in the present case (viz. *Webster* v. *Reid*, 11 How. 437; *Brown* v. *Levee Commissioners*, 50 Miss. 468; *Bardwell* v. *Collins*, 44 Minn. 97; *State* v. *Guilbert*, 56 Ohio St. 575).

CONCLUSIVE EFFECT OF REGISTRATION OF SUBSEQUENT DEALINGS.

7. *The Second Objection* to the validity of the act is that the registration of dealings with registered land, after the original registration, would in certain cases have the effect of depriving the registered owners of their property without due process of law.

Subsequent dealings with the land are effected, as already set out (*supra*, p. 4), by entries made by the recorder or assistant recorders upon the certificate of title in pursuance of deeds and other instruments similar to those now in use for the like purpose (s. 50),

and upon a conveyance in fee the new owner receives a new certificate of title (s. 57). The entries of the recorder and assistant recorders are effectual to transfer or affect the land (s. 50), and their certificates and memoranda on them bind the registered owner and all persons claiming under him in favor of bona fide purchasers (ss. 39, 55), except in the case of a registration obtained by forgery *after* the original registration (s. 55).

Whenever a conveyance is presented to an assistant recorder for registration, he is obliged to determine whether upon its true construction the land described in it is the same as that comprised in the certificate or part of it, and whether the estate conveyed is an estate in fee simple or for life or otherwise, and whether the grantor actually has the estate he assumes to convey or the power to convey it. He must ascertain that the grantor did not execute it under such a mistake as to its character as would render it void (*Foster* v. *Mackinnon*, L.R. 4 C.P. p. 711). He must determine whether he is married or not; and, if he is married and the conveyance is executed by some person as his wife, he must ascertain that such person is really his wife. If the conveyance is executed by attorney (s. 104), he must determine whether the power of attorney is applicable to the land comprised in the conveyance, and whether it authorises the intended transfer. When a conveyance upon sale under a mortgage is to be registered, he must also determine that the circumstances authorised the sale, and that the power has been strictly followed. In acting on the affidavit, which is only prima facie evidence (P.S. c. 181, s. 18), he determines that the facts are as stated in it. When a conveyance is made under a power in a deed or will, he must determine that the true construction of the power and the circumstances existing at the time are such that the conveyance is authorised.

It may be that none of these questions will occur to the assistant recorder or be raised before him. But they will be *absolutely concluded* by the entry that he makes in the register. If he issues a new certificate to the purchaser, the estate specified in it will pass to him, although the conveyance upon which it was founded did not,

according to its true construction, purport to transfer either t whole of the land or the estate specified in the certificate, althou the grantor did not have the estate he assumes to convey or t power to deal with it, and although the conveyance was in the c cumstances absolutely void.

"Every applicant receiving a certificate of title in pursuance of decree of registration, and *every subsequent purchaser* of register land who takes a certificate of title for value and in good faith, *sh hold the same* free from all incumbrances except those noted on t certificate," &c. (s. 39). "The act of *registration*" by the record or assistant recorder, and not the instrument executed by the grantc is "the *operative act* to convey or affect the estate" (s. 50). A "the new certificate or memorandum shall be binding upon t registered owner and upon all persons claiming under him, in fav of every purchaser for value and in good faith" (s. 55).

The assistant recorder may register an estate in fee simple whe the conveyance, according to its true construction, transfers only life estate, or he may include in the registration a larger or differe part of the land comprised in the previous certificate than the co veyance authorises. He may register a conveyance under a powe where, according to the true construction of the power or in th existing circumstances, the grantor could not properly make suc conveyance. The conveyance may be contrary to the rights of wife or husband, or of a mortgagor or mortgagee, or may be on that is in fact absolutely void. But the registration vests the estat in the registered owner, and excludes the rights of others.

The persons entitled to the land under the previous registratio are thus deprived of their property, and all these proceedings ma take place in their absence and without their having any notice o the proposed registration or any opportunity to protect themselves These persons may be tenants in common or joint tenants with th person by whom the conveyance is executed, or may be entitle to future interests indefeasibly or in default of the exercise o a power that the conveyance purports to exercise, and they ma be ignorant that the conveyance was made or intended. Th persons to whom the future interests are limited may even b

unborn. So far as any interest is transferred by the act of registration in excess of what would have passed by the conveyance independently of the act, that interest is taken away from the owner by the arbitrary act of the recorder and transferred to the newly registered owner. This is not due process of law.

The legislature cannot provide "that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B."

Davidson v. *New Orleans*, 96 U.S. p. 102.

Chicago, Burlington, & Quincy Rld. Co. v. *Chicago*, 166 U.S. pp. 235, 237.

Wilkinson v. *Leland*, 2 Pet. p. 658.

So it cannot provide that the title of A shall be vested in B by an improper act of a recorder.

It is the clear intention of the act that the registration shall have this effect, for it gives compensation to the rightful owners *deprived* of their property through *fraud*, *error*, *omission*, *mistake*, *or misdescription* in the registration of any other person (s. 96). And this effect is necessary in order to carry out the purpose of giving to a purchaser absolute certainty that he acquires the title stated in the certificate.

Thus, in giving to purchasers greater security in *acquiring* a good title, the act takes away from owners part of the security they now have in *keeping* the title they have got.

No other property is subject to transfer in any such manner. The nearest resemblance is found in the transfer of shares in companies, but in that case the mistake or fraud of the transfer agent does not give the title to the transferee. If the transfer that is registered is unauthorised, the title of the true owner is not affected, and the issue of the new certificate to the transferee only gives *him* a right to compensation. But under this act the mistake or fraud of the assistant recorder transfers the title from the owner to the person in whose name it has been improperly registered, and gives the *owner* the right to compensation.

The land of which the owner is thus deprived is not taken for any public purpose, but for the private purposes of the purchaser. The state has no right to take private property from the owner without his consent and require him to accept compensation in its place, unless the purpose to which the property is to be applied, is a public one.

Missouri Pacific Ry. Co. v. *Nebraska*, 164 U.S. 403, 417.
Lowell v. *Boston*, 111 Mass. 454.

The compensation clauses are therefore immaterial.

TENURE.

This objection is disposed of in *People* v. *Simon*, 176 Ill. 165, 176–7, as a mere question of *tenure*. The court says that so long as vested rights are not disturbed, the law may at any time change the tenure of land, the conditions of alienation, and the rules of evidence for determining the title. The theory of the act, as the court understood it, was that, after the true state of the title had been ascertained and declared, "the tenure of the owner, the right of transfer and incumbrance, and all rights subsequently accruing, shall be determined in accordance with the rules now prescribed" (p. 176), and accordingly the court saw "no reason why the transfer of real estate may not be made in the way contemplated" (p. 177).

It is not a rule of tenure that secures the owner against being deprived of his property without due process of law. It is the provision of the Constitution that protects him. The legislature cannot make a rule of tenure or of property that is contrary to the Constitution. If the legislature enacts that property shall not be hereafter acquired except on the terms that the owner may be deprived of it without due process of law, the enactment is itself in conflict with this provision of the Constitution.

This Court says, in *Holden* v. *Hardy*, 169 U.S. p. 391,

"As the possession of *property*, of which a person *cannot be deprived* doubtless implies that *such property may be acquired*, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property, would also be obnoxious to the same provision. Indeed we may go a step further, and say that, as property can only be

legally acquired as between living persons by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid."

REASONS OF THE MAJORITY OF THE COURT BELOW.

The majority of the court below add the following arguments against this objection: —

(*a*) It should be observed that by s. 55, the production of the owner's duplicate certificate, whenever any voluntary instrument is presented for registration, is *conclusive authority* from the registered owner for the entry of a new certificate or the making of a memorandum of registration." (*Trans.* p. 38.)

The act says (s. 55) that the production of the duplicate certificate, when the voluntary instrument is presented, shall be conclusive authority "to enter a new certificate or to make a memorandum of registration *in accordance with such instrument*." It does not say that the production of the certificate shall be conclusive authority to make mistakes or commit frauds, or to make any entry contrary to the terms of the instrument. Yet if the recorder by mistake or fraud makes a wrong entry, the holder of the new certificate acquires a good title, and the person deprived of it is driven to compensation out of the fund.

Then too the conclusive authority inferred from the production of the duplicate certificate can only be that of the owner of the certificate produced. When there are several owners in common or otherwise, and separate duplicates are issued to them according to s. 43, the production of the duplicate certificate of one of them cannot be conclusive authority from the others. Accordingly if one of three tenants in common undertakes to convey one half or the whole, instead of one third, or if a tenant for life, with a power to appoint in fee simple in certain circumstances, assumes to convey an estate in fee simple in other circumstances, the production of that person's duplicate is no authority from the other persons interested to make an entry of a transfer in excess of the estate or power of the owner of the duplicate. Still a wrong entry by the recorder will pass the estate.

Moreover this provision is an arbitrary attempt to create by statute

a conclusive presumption of fact, by which a man may be deprived of his property. It may be competent for the legislature to provide that the production of the certificate shall be *prima facie* evidence, but it cannot make such production *conclusive* evidence that an authority has been given when in fact it has not been given (*Marx* v. *Hanthorn*, 148 U.S. 172; Cooley Const. Lim. (6th ed. 1890) 452). The owner's duplicate certificate may be taken without his knowledge or consent, and even when he is incapable from illness or otherwise of preventing the taking or the improper use of it. It is possible to suppose the case of an undelivered deed taken with the duplicate certificate and registered during the owner's illness or after his death. An original applicant for registration may by his application consent that possession of the certificate shall be conclusive evidence of authority as against him. But future owners do not give any such consent, and he cannot bind them by his consent.

(*b*) It is also said, "By s. 45 the obtaining of a decree of registration, which is a voluntary act, is *an agreement running with the land* that the land shall be and remain registered land and subject to the provisions of the act." (*Trans.* p. 38.)

How does this provision of the act affect the question? Independently of the act, no covenant or agreement that the applicant for registration could make with the state, or with any prior owner or anybody else, would so bind the future owners through all time than they could be deprived of their property by the act of some person holding at the time the office of recorder. No such liability can be annexed to the title by a covenant or agreement running with the land. A covenant does not run with the land unless the person with whom it is made has some interest in the land and the covenant relates to that interest (*Bronson* v. *Coffin*, 108 Mass. p. 180; *Norcross* v. *James*, 140 Mass. p. 190–191). The state has no interest in the land; the prior owner, when he conveyed it, parted with all he had; and the covenant or agreement creates no easement or other right in the land. If an owner of land should make such a covenant or agreement with anybody, although it purported to bind his heirs and assigns, a subsequent purchaser would not be bound by it. The reference to "an agreement running with the land" therefore has no effect so far as future owners are concerned.

The act, in saying that an agreement running with the land shall e implied from the acts of the applicant, is in reality only declaring hat future owners shall be subject to liability under an agreement o which they are not parties. That is the same thing as imposing the iability directly by force of the act, without reference to any greement.

If no such provision had been inserted in the act, the registration of the land, upon the application of the owner, would have subjected it to all the provisions of the act, unless they were contrary to the Constitution. By his application he would have agreed to the provisions concerning subsequent dealings with the land, whether the provisions would otherwise have been contrary to the Constitution or not, and no constitutional right of his would be violated if he were afterwards deprived of his land, in any way according to those provisions. But his agreement would not bind subsequent owners, for they were not parties to it, and they would be protected by the Constitution if the act contained any provisions by which they might be deprived of their interest in the land without due process of law. It could not be said that they assented to these provisions by taking a title that had been registered. That would be equivalent to saying that the state can, with the assent of the present owner, annex a new quality to the land by which no interest afterwards acquired in it would be protected by the Constitution. If the state can do that with the assent of the present owner, it can do so on his death without his consent, for the state has absolute power to determine how property shall devolve upon the death of the owner (*U.S.* v. *Perkins*, 163 U.S. p. 628). But the state has no power to annex conditions or incidents to property that are in conflict with the Constitution, either with the present owner's consent in his lifetime, or without it at his death.

(c) Finally it is said, "Furthermore in deciding whether *substantial justice* is done, it is to be borne in mind that *ordinary cases* will present no question at all. It is contemplated, as we have said, that if there is a question to be discerned it shall be referred to the court, and of course the court will order notice to any party interested." (*Trans.* p. 38.)

The first part of this sentence seems to assume that substantial justice is done if rights of property are not violated in ordinary cases, and that it is not material if they are occasionally violated in other cases. But the Constitution protects all persons, and prohibits a state from depriving any person of his property without due process of law. If the act contains provisions by which any one person can in any case be so deprived of his property, it is contrary to this clause of the Constitution. This is clearly shown by *Loring*, J., in the court below (*Trans.* p. 48).

As to referring questions to the court, the act only provides that this shall be done "where the assistant recorder *is in doubt* upon any question, or where any party in interest does not agree as to the proper memorandum to be made" (s. 53). But the assistant recorder might not be in doubt, even in cases of difficulty, and he might not see the question at all. The act contemplates that he shall determine the matter in all cases where he is clear and nobody raises a question. If he acts without referring any question to the court, although in fact a difficult question is involved, his entry in the register passes the title, and the holder of the new certificate holds it free of all claims of persons entitled under the previous certificate (ss. 39, 55).

Moreover a reference of a question to the court does not necessarily secure notice to all persons interested. The act provides that the court, "after notice to all parties and a hearing," shall enter an order, and the assistant recorder "shall make registration in accordance therewith" (s. 53). But the court may not ascertain correctly what persons are interested in the question, or there may be some defect in the service of the notice upon the persons to whom it is directed. The act does not make the validity of the registration depend upon the due service of notice upon all persons actually interested. The issue of a new certificate, whether issued by the assistant recorder on his own responsibility or by order of the court, vests the title in the purchaser absolutely, and he is not bound to see to the regularity of the previous proceedings.

There is no justification for thus taking away from the holders of registered titles the security to which they are entitled under the Con-

itution. Even if the constitutional provision stood in the way of tablishing a system of registration of title, that would not be a suffi-ent reason for disregarding it. But it is perfectly feasible to have system of registration by which a purchaser shall be secured acquiring a good title, and at the same time the holder of any tle shall be as secure in holding it as he is now. When registration f title was first talked of, it was said that the transfer of land might e made as simple and secure as the transfer of shares in companies. But no shareholder can be deprived of his shares by mistakes or fraudulent entries in the register. Mistakes and frauds sometimes occur, but they do not deprive anyone of shares that belong to him, although a new certificate may have been issued to the purchaser. The loss of the shares falls on the purchaser, and he is thereby entitled to compensation. The same principle is applicable to the registration of land. The purchaser would get all the security that the present act now provides for an owner deprived of his property under its provisions, and the owner would be as secure against deprivation as he is now.

VALIDITY OF THE WHOLE ACT AFFECTED BY EACH OBJECTION.

8. If the provisions of the act are invalid as regards the conclusiveness of either (1) the original registration or (2) the registration of subsequent dealings, then the whole act is invalid, for the entire system established by it is dependent on the absolute conclusiveness of these two things, and the act entirely fails in its purpose if this conclusiveness is not obtained.

Warren v. *Charlestown*, 2 Gray 84, 99–100.
Nolan's Case, 122 Mass. 330, 332–3.
Trade Mark Cases, 100 U.S. 82, 98–99.
Virginia Coupon Cases, 114 U.S. 269, 304–5.

The object of the original registration is to obtain such an absolute certainty of title that the certificate may be relied on in all future dealings as conclusive evidence of title, and that examination of title on each transfer may be done away with. A decree that was

conclusive as to some persons and not as to others would be useless, for purchasers would still be obliged to investigate the title in the ordinary way, in order to be sure that there were not persons having an interest and not concluded by the decree.

Quoting from the brief of the Attorney General in the court below, "The efficacy of the Torrens System consists in this, that it provides a method of posting up titles to date. This posted-up title, good against everyone, is the root of title, back of which there is no need of going. The way in which this root is obtained is by a judicial proceeding establishing absolutely and against all the world, after the most complete and general notice possible, the state of the title. . . . It is a necessity and indeed the life of the system that all persons should be concluded by the decree."

The registration of subsequent dealings has the same object as the original registration.

If the subsequent dealings with the land cannot be had in the manner and with the conclusive effect declared in the act, the whole purpose of registration fails.

Under the provisions of the act the only manner in which subsequent dealings can be effected is by entries made by the recorder or assistant recorder (s. 50), and these entries are made conclusive (ss. 55, 39). There is no other way in which registered land can be effectually transferred at all (s. 50), and no land once registered can be withdrawn from registration (s. 45).

The Ohio act was held to be entirely void in *State* v. *Guilbert*, 56 Ohio St. 575, 630.

In the Illinois case (*People* v. *Simon*, 176 Ill. 165, 176) it would have been unnecessary to consider the second objection if the act could have been upheld without disposing of it.

PROHIBITION.

9. As the Court of Registration is without jurisdiction to deal with the matters involved in the case before it, prohibition, which lies to all inferior tribunals (*Connecticut River Rld. Co.* v. *County*

Com., 127 Mass. 50, 57–60), and even to a pretended court (*Chambers* v. *Jennings*, 2 Salk. 553), is the proper remedy.

See also *Mayor of London* v. *Cox*, L.R. 2 H.L. 239.
Hyde Park v. *Wiggin*, 157 Mass. 94.

It is not necessary that the question of jurisdiction should be raised in the inferior court, for the party may at his option either plead there or apply for a prohibition (*Mayor of London* v. *Cox*, L.R. 2 H.L. pp. 275–291, where the opinion of the judges by *Willes*, J., was adopted by the House of Lords, p. 294). "The rule is, that where want of jurisdiction is apparent upon the proceedings, prohibition goes at any time after service of the process, and even before articles 'because it is much better for the party to apply for prohibition in the first stage than after expense is incurred'" (p. 281). (See also *Connecticut River Rld. Co.* v. *County Com.*, 127 Mass. p. 59.) In the present case the inferior court was not legally competent to entertain any question whatever.

The present applicant is one of the adjoining owners, against whom the process runs (s. 31, form), and a party defendant (s. 35). He is summoned into court for the purpose of having the boundaries of his land determined (s. 36); and the decree, which might take from him a part of what he claims as his land, is intended to be binding on him (s. 38). He makes this application for a prohibition in order that he may not be obliged to litigate that question in a court that is without jurisdiction to deal with it. As the want of jurisdiction appears on the face of the proceedings, he is entitled to a writ of prohibition.

Mayor of London v. *Cox*, L.R. 2 H.L. p. 278.
Smith v. *Whitney*, 116 U.S. p. 173.
In re Rice, 155 U.S. p. 402.

It is submitted that the judgment of the court below should be reversed and the case remanded with directions to enter a judgment awarding a writ of prohibition, as in *Furman* v. *Nichol*, 8 Wall. 44, 64.

J. L. THORNDIKE.

APPENDIX

1898, c. 562.

An Act to provide for registering and confirming titles to land.

1. This act may be cited as the Land Registration Act.

COURT OF REGISTRATION.

2. A court is hereby established, to be called the Court of Registration, which shall have exclusive original jurisdiction of all applications for the registration of title to land within the Commonwealth, with power to hear and determine all questions arising upon such applications, and also shall have jurisdiction over such other questions as may come before it under this act, subject however to the right of appeal, as hereinafter provided.*

The court shall hold its sittings in Boston, but may adjourn from time to time to such other places as the public convenience may require. In the county of Suffolk the board of aldermen of the city of Boston, and in other counties the county commissioners, shall provide suitable rooms for the sittings of the Court of Registration, in the same building with or convenient to the Probate Court or the Registry of Deeds, and shall provide all necessary books and such printed blanks and stationery for use in registration proceedings as may be ordered by the court.

The court shall have jurisdiction throughout the Commonwealth, and shall always be open, except on Sundays and holidays established by law. It shall be a court of record, and shall cause to be made a seal, and to be sealed therewith all orders, process and papers made by or proceeding from the court and requiring a seal. All notices, orders and process of said court may run into any county and be returnable as the court may direct.

The court shall from time to time make general rules and forms for procedure, conforming as near as may be to the practice in the probate courts, but subject to the express provisions of this act and to general laws. Such rules and forms before taking effect shall be approved by the Supreme Judicial Court or a justice thereof.

---

* *The following is added by* 1899, c. 131, s. 1, "The proceedings upon such applications shall be proceedings *in rem* against the land, and the decrees shall operate directly on the land and vest and establish title thereto."

In this act, except where the context requires a different cons
tion, the word court shall mean the Court of Registration.

3. The governor, with the advice and consent of the cou
shall appoint two judges of the Court of Registration, one of w
shall be appointed, commissioned and qualified as judge of regi
tion, and the other as assistant judge of registration, each to
his office during good behavior; and any vacancy shall be fille
the manner provided by the constitution.

4. The authority and jurisdiction of the Court of Registra
shall begin and take effect as soon as the judges thereof are appoi
and qualified. The court may be held by a single judge, and w
so held shall have all the authority and jurisdiction committe
said court. Different sessions may be held at the same time, ei
in the same county or in different counties, as the judges
decide, and they shall so arrange the sessions as to insure a pro
discharge of the business of the court.

5. Citations, orders of notice, and all other process issuing f
the court shall bear test of the judge of registration, and be un
the seal of the court and signed by the clerk.

6. In case of a vacancy in the office of judge of registration,
of his absence or inability to perform his duties, the assistant ju
shall perform them, until the vacancy is filled or any disabilit
removed.

7. The governor, with the advice and consent of the coun
shall appoint a recorder, who shall be clerk of the court, and w
shall hold his office for the term of five years. He shall attend
sessions of the court and keep a docket of all causes, and shall a
the seal of the court to all process or papers proceeding therefr
and requiring a seal.

8. The recorder shall be under the direction of the court, a
shall have the custody and control of all papers and documents fil
with him under the provisions of this act, and shall carefully nu
ber and index the same. Said papers and documents shall be ke
in Boston in an office to be called the Land Registration Offic
which shall be near the Court of Registration. The recorder sh
have authority, with the sanction of the court, to employ such assi
tants and messengers as may be necessary.

9. The recorder may act in any county, and after land has be
registered under this act he may make all memoranda affecting t
title, and enter and issue certificates of title as provided herein.

10. The registers of deeds in each registry district, after a
land within their respective districts has been registered under th
act, shall have the same authority as the recorder to make all m
moranda affecting the title of such land, and to enter and issue ne
certificates of title as provided herein, and to affix the seal of t
court to such certificates and duplicate certificates of title; but i
executing the provisions of this act the registers of deeds shall h

subject to the general direction of the recorder, in order to secure uniformity throughout the Commonwealth; and their official designation shall be assistant recorders for the registry district in which they are severally registers of deeds. In case of the death or disability of the recorder the assistant recorder for the Suffolk district shall perform the duties of the recorder until the vacancy is filled or the disability removed.

11. The recorder and all assistant recorders shall be sworn before the judge of registration, and a record thereof shall be made. They shall give bond in a sum to be fixed by the court, for the faithful performance of their official duties, before entering upon the same. They may administer oaths in all cases in which an oath is required, to persons appearing before them in matters pertaining to the registration of land. They shall keep accurate accounts of all moneys received as fees or otherwise, which shall be subject to examination by the controller of county accounts, in the same manner as accounts of registers of deeds, and they shall pay over such moneys quarterly to the treasurer of the Commonwealth. In case of the absence of any assistant recorder the assistant register for the district, or if there is no assistant register the person acting as clerk in the office of the register of deeds, shall perform the duties of the assistant recorder, and the assistant recorder shall be responsible for him.

12. The judge of registration may appoint one or more examiners of title in each county, who shall be attorneys at law, and shall be subject to removal by the Supreme Judicial Court.

13. The salary of the judge of registration shall be forty-five hundred dollars a year. The salary of the assistant judge of registration shall be four thousand dollars a year. The salaries of the recorder, assistant recorders, examiners of titles, and all assistants and messengers shall be fixed by the governor and council. All salaries and expenses of the court shall be paid from the treasury of the Commonwealth.

14. Every order, decision and decree of the Court of Registration shall be subject to appeal to the Superior Court for the county where the land lies, concerning which the order, decision or decree appealed from was made. The appeal shall be claimed and entered within thirty days from the date of such order, decision or decree, and the party appealing shall at the time of entering his appeal file in the Superior Court copies of all material papers in the case, certified by the recorder. Appearances and answers shall be filed in the Superior Court within thirty days after the appeal is entered, unless for good cause further time is allowed, and upon the motion of either party the cause shall be advanced for speedy hearing, and shall be tried by the court, unless either party within the time allowed for entering appearance claims trial by jury, in which case issues for the jury shall be framed. Questions of law arising in the Superior Court may be taken to the Supreme Judicial Court for revision by

any party aggrieved, in the same manner as in proceedings at l in the Superior Court.*

15. At the end of the proceedings on appeal the clerk of [*Superior* †] Court shall certify to the Court of Registration final decision on the appeal, and the Court of Registration shall en the final decree in the cause, in accordance with the certificate of clerk of the [*Superior* †] Court.

16. If the party appealing does not duly prosecute his app within the time limited the original order, decision or decree sh stand as if no appeal had been taken.

17. The Court of Registration in all matters over which it h jurisdiction may enforce its orders or decrees, in the same mann as decrees are enforced in equity, and upon the request of the jud of registration the sheriff of any county shall assign a deputy attend the sittings of the court in that county.

18. Costs shall be taxed as in the Superior Court sitting equity, where no different provision is made.

ORIGINAL REGISTRATION.

19. Application for registration of title may be made by t following persons, namely:

First. The person or persons claiming, singly or collectively, own the legal estate in fee simple.

Second. The person or persons claiming, singly or collectivel to have the power of appointing or disposing of the legal estate fee simple.

Third. Infants and other persons under disability may mak application by their legally appointed guardians; but the person whose behalf the application is made shall be named as applicant.

Fourth. Corporations may make application by any officer dul authorized by a vote of the directors: provided, however, that on or more tenants for a term of years, which is regarded as a fe simple in section one of chapter one hundred and twenty-one of th Public Statutes, shall not be allowed to make application excep jointly with those claiming the reversionary interest which makes u the fee simple at common law; nor shall a mortgagor make appl cation without the consent in writing of the mortgagee; nor a ma

* *The following is added by* 1899, c. 131, s. 2, "Questions of law arising i the Court of Registration on any decision or decree may be taken by any part direct to the Supreme Judicial Court for revision, in the same manner as que tions of law are taken to that court from the Superior Court. The Court Registration after any decision or decree dependent upon the determination questions of law may report such decision or decree for the consideration the full bench of the Supreme Judicial Court, with so much of the case as necessary for understanding such questions of law."

† *The word* "appellate" *is substituted for the word* "Superior" *by* 189 c. 131, s. 3.

ried woman without the consent in writing of her husband, unless she holds the land as her separate property or has a power to appoint the same in fee simple, or has obtained a decree of the Probate Court under the provisions of chapter two hundred and fifty-five of the acts of the year eighteen hundred and eighty-five, as amended by chapter two hundred and ninety of the acts of the year eighteen hundred and eighty-seven; nor one or more tenants claiming undivided shares less than a fee simple in the whole land described in the application.

20. The application may be filed with the recorder, or with the assistant recorder at the registry of deeds for the district in which the land, or any portion thereof, lies. Upon filing his application the applicant shall forthwith cause to be filed in the registry of deeds for the said district or districts a memorandum stating that application for registration has been filed, and the date and place of filing, and a copy of the description of the land contained in the application. This memorandum shall be recorded and indexed by the register with the records of deeds. Each assistant recorder shall also keep an index of all applications in his district, and in every case where the application is filed with him shall, [*after recording*,*] transmit the same, with the papers and plans filed therewith,† to the recorder.

21. The application shall be in writing, signed and sworn to by the applicant or by some person duly authorized in his behalf. If there is more than one applicant the application shall be signed and sworn to by or in behalf of each. It shall contain a description of the land, and shall state whether the applicant is married; and if married the name of the wife or husband; and if unmarried whether he or she has been married, and if so, when and how the marriage relation terminated; and if by divorce, when, where and by what court the divorce was granted. It shall also state the name in full and the address of the applicant, and also the names and addresses of the adjoining owners and occupants, if known; and if not known it shall state what search has been made to find them. It may be in form as follows:

COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Judge of the Court of Registration.

I (or we) the undersigned, hereby apply to have the land hereinafter described brought under the operation and provisions of the land registration act, and to have my (or our) title therein registered and confirmed. And I (or we) declare: (1) That I am (or we are) the owner (or owners) in fee simple of a certain parcel of land with the buildings (if any, and if not, strike out the clause), situate in (here insert accurate description). (2) That said land at the last assessment for taxation was assessed at dollars; and the buildings (if any) at dollars. (3) That I (or we) do not know of any

---

* *These two words are struck out by* 1899, c. 131, s. 4.

† *The following is inserted by* 1899, c. 131, s. 4, "and such memorandum when recorded."

mortgage or encumbrance affecting said land, or that any other person has any estate or interest therein, legal or equitable, in possession, remainder, reversion or expectancy. (If any, add "other than as follows," and set forth each clearly.) (4) That I (or we) obtained title (if by deed, state name of grantor, date and place of record, and file the deed or state reason for not filing. If in any other way, state it. (5) That said land is occupied. (If occupied state name in full and place of residence and post office address of occupant and the nature of his occupancy. If unoccupied, insert "not.") (6) That the names in full and addresses as far as known to me (or us) of the occupants of all lands adjoining said land are as follows: (Give street and number wherever possible. If names not known state whether inquiry has been made, and what inquiry. (7) That the names and addresses so far as known to me (or us) of the owners of all lands adjoining the above land are as follows: (Same directions as above.) (8) That I am (or we are) married. (Follow literally the directions given in section twenty-one of the land registration act.) (9) That my (or our) full name (or names), residence and post office address is (or are) as follows:

Dated this day of in the year eighteen hundred and ninety-

(Schedule of documents.) (Signature.)

COMMONWEALTH OF MASSACHUSETTS.

, ss. 19 ,

Then personally appeared the above named , known to me to be the signer (or signers) of the foregoing application, and made oath that the statements made therein, so far as made of his (or their) own knowledge are true, and so far as made upon information and belief, that he (or they) believe them to be true, before me,

Justice of the Peace.

22. If the applicant is not a resident of the Commonwealth he shall file with his application a paper appointing an agent residing in the Commonwealth, giving his name in full and post office address, and shall therein agree that the service of any legal process in proceedings under or growing out of the application shall be of the same legal effect when made on said agent, as if made on the applicant within the Commonwealth. If the agent dies, or removes from the Commonwealth, the applicant shall at once make another appointment; and if he fails to do so the court may dismiss the application.

23. Amendments to the application, including joinder, substitution, or discontinuing as to parties, shall be allowed by the court at any time upon terms that are just and reasonable; but all amendments shall be in writing, signed and sworn to, like the original.

24. An application may include two or more contiguous parcels of land * within the same registry district. But two or more persons claiming in the same parcels different interests, which collectively make up the legal estate in fee simple in each parcel, shall not join in one application for more than one parcel unless their interests are alike in each and every parcel. The court may at any time order

**Amended by inserting the words,* "or two or more parcels constituting one holding under one and the same title." 1899, c. 131, s. 5.

an application to be amended by striking out one or more of the parcels, or by a severance of the application.

25. If the application describes the land as bounded on a public or private way it shall state whether or not the applicant claims any and what land within the limits of the way, and whether the applicant desires to have the line of the way determined.

26. The applicant shall file with the application a plan of the land, and all original muniments of title within his control mentioned in the schedule of documents. Such original muniments as affect land not included in the application may be withdrawn on filing certified copies of the same. When the application is dismissed or discontinued the applicant may, with the consent of the court, withdraw such original muniments of title.

27. When an application is made subject to an existing mortgage or lease, executed by the applicant or some predecessor in title, the applicant shall file with the application a certified copy of the mortgage or lease, and cause the original to be presented for registration, before a decree of registration is entered.

28. The court may by general rule require facts to be stated in the application in addition to those prescribed by this act, and not inconsistent therewith, and may require the filing of any additional papers.

29. After the filing of an application, and before registration, the land therein described may be dealt with, and instruments relating thereto shall be recorded in the same manner as if no such application had been filed; but all instruments left for record relating to such land shall be indexed in the usual manner in the registry indexes, and also in the index of applications. As soon as an application is disposed of the recorder shall make a memorandum stating the disposition of the case, and shall send the same to the register of deeds for the proper district or districts, who shall record and index it with the records of deeds, and in the index of applications. If the proceedings upon the application end in a decree of registration of title the land included therein shall, as soon as the said decree is transcribed, as hereinafter provided in section forty-one, become registered land, and thereafter no deeds or other instruments relating solely to such land shall be recorded with the records of deeds, but shall be registered in the registration book and filed and indexed with the records and documents relating to registered land.

30. Immediately after the filing of an application the court shall enter an order referring it to one of the examiners of title, who shall search the records and investigate all facts stated in the application, or otherwise brought to his notice, and file in the case a report thereon, concluding with a certificate of his opinion upon the title. The recorder shall give notibe to the applicant of the filing of such report. If the opinion of the examiner is adverse to

the applicant be shall be allowed by the court a reasonable time in which to elect to proceed further or to withdraw his application. The election shall be made in writing and filed with the recorder.

31. If, in the opinion of the examiner, the applicant has a good title as alleged, and proper for registration, or, if the applicant after an adverse opinion of the examiner, elects to proceed further, the recorder shall, immediately upon the filing of the examiner's opinion, or the applicant's election, as the case may be, cause notice of the filing of the application to be published by the recorder in some newspaper published in the district where any portion of the land lie. The notice shall be issued by the order of the court, attested by the recorder, and shall be in form substantially as follows:

REGISTRATION OF TITLE.

SUFFOLK ss. COURT OF REGISTRATION.

To (here insert the names of all persons known to have an adverse interest, and the adjoining owners and occupants, so far as known), and to all whom it may concern:

WHEREAS an application has been presented to said court by (name or names and address in full) to register and confirm his (or their) title in the following described land (insert description).

You are hereby cited to appear at the Court of Registration to be held at , in said county of on the day of A. D., at o'clock in the forenoon, to show cause, if any you have, why the prayer of said application should not be granted. And unless you appear at said court at the time and place aforesaid your default will be recorded, and the said application will be taken as confessed, and you will be forever barred from contesting said application or any decree entered thereon.

WITNESS Esquire, judge of said court, this day of in the year eighteen hundred and ninety-

Attest:

Recorder.

32. The return day of said notice shall be not less than twenty nor more than sixty days from the date of issue. The court shall also, within seven days after publication of said notice in a newspaper, cause a copy of the same to be mailed by the recorder to every person named therein whose address is known. The court shall also cause a duly attested copy of the notice to be posted in a conspicuous place on each parcel of land included in the application, by a sheriff or deputy sheriff, fourteen days at least before the return day thereof, and his return shall be conclusive proof of such service. If the applicant requests to have the line of a public way determined the court shall order notice to be given by the recorder, by mailing a registered letter to the mayor of the city or to one of the selectmen of the town or towns in which the land lies, or, if the way is a highway, to one of the county commissioners of the county or counties in which the land lies. If the land borders on a river, navigable stream or shore, or on an arm of the sea where a river or harbor line has been established, or on a great pond, or if it other-

wise appears from the application or the proceedings that the Commonwealth may have a claim adverse to that of the applicant, notice shall be given in the same manner to the attorney-general. The court may also cause other or further notice of the application to be given in such manner and to such persons as it may deem proper.* The certificate of the recorder that he has served the notice as directed by the court, by publishing or mailing, shall be filed in the case before the return day, and shall be conclusive proof of such service.

33. Upon the return day of the notice, and proof of service of all orders of notice issued, the court may appoint a disinterested person to act as guardian ad litem for minors, and for all persons not in being † who may have an interest. The compensation of the guardian or agent shall be determined by the court and paid as part of the expenses of the court.

34. Any person claiming an interest, whether named in the notice or not, may appear and file an answer on or before the return day, or within such further time as may be allowed by the court. The answer shall state all objections to the application, and shall set forth the interest claimed by the party filing the same, and shall be signed and sworn to by him or by some person in his behalf.

35. If no person appears and answers within the time allowed the court may at once upon motion of the applicant, no reason to the contrary appearing, order a general default to be recorded and the application to be taken for confessed. By the description in the notice, "to all whom it may concern," all the world are made parties defendant and shall be concluded by the default and order. After such default and order the court may enter a decree confirming the title of the applicant and ordering registration of the same. The court shall not be bound by the report of the examiner of title, but may require other or further proof.

36. If in any case an appearance is entered and answer filed the cause shall be set down for hearing on the motion of either party, but a default and order shall first be entered against all persons who do not appear and answer, in the manner provided in the preceding section. The court may refer the cause or any part thereof to one of the examiners of title, as master, to hear the parties and their evidence, and make report thereof to the court. His report shall have the same weight as that of a master appointed by the Superior Court in equity, and he shall proceed according to the rules of said

---

*Amended by inserting the following, "The court shall, so far as it deems it possible, require proof of actual notice to all adjoining owners and to all persons who appear to have any interest in or claim to the land included in the application. Notice to such persons by mail shall be by registered letter." 1900, c. 354, s. 5.

†Amended by insertion of the words, "unascertained, unknown, or out of the Commonwealth." 1899, c. 131, s. 6.

court applicable to masters, except as the same may be modified by the rules of the Court of Registration. The court may in any case before decree require a survey to be made for the purpose of determining boundaries, and may order durable bounds to be set, and referred to in the application, by amendment. The expense of survey and bounds shall be taxed in the costs of the case and may be apportioned among the parties as justice may require. If no persons appear to oppose the application such expense shall be borne by the applicant.

37. If in any case the court finds the applicant has not title proper for registration a decree shall be entered dismissing the application, and such decree may be ordered to be without prejudice. The applicant may withdraw his application at any time before final decree, upon terms to be fixed by the court.

38. If the court after hearing finds the applicant has title as stated in his application, and proper for registration, a decree of confirmation and registration shall be entered. Every decree of registration shall bind the land, and quiet the title thereto, subject only to the exceptions stated in the following section. It shall be conclusive upon and against all persons, including the Commonwealth, whether mentioned by name in the application, notice or citation, or included in the general description "to all whom it may concern." Such decree shall not be opened by reason of the absence, infancy or other disability of any person affected thereby, nor by any proceeding at law or in equity for reversing judgments or decrees; subject however to the right of any person deprived of land or of any estate or interest therein by a decree of registration obtained by fraud to file a petition for review within one year after the entry of the decree, provided no innocent purchaser for value has acquired an interest. If there is any such purchaser the decree of registration shall not be opened but shall remain in full force and effect forever, subject only to the right of appeal hereinbefore provided. But any person aggrieved by such decree in any case may pursue his remedy by action of tort against the applicant or any other person for fraud in procuring the decree.

39. Every applicant receiving a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land who takes a certificate of title for value and in good faith, shall hold the same free from all encumbrances except those noted on the certificate, and any of the following encumbrances which may be subsisting, namely:

First. Liens, claims or rights arising or existing under the laws or constitution of the United States which the statutes of this Commonwealth cannot require to appear of record in the registry.

Second. Taxes within two years after the same have been committed to the collector.

Third. Any highway, town way, or any private way laid out

der the provisions of section sixty-five of chapter forty-nine of the blic Statutes or any act in amendment thereof or in substitution refor, where the certificate of title does not state that the boundary such way has been determined.

Fourth. Any lease for a term not exceeding seven years.

Fifth. Any liability to assessment for betterments, or other sta- tory liability which may attach to land in this Commonwealth as a n prior to, or independent of, the recording or registering of any per: provided, however, that if there are easements or other rights ppurtenant to a parcel of registered land which for any reason have iled to be registered, such easements or rights shall remain so ppurtenant notwithstanding such failure, and shall be held to pass ith the land until cut off or extinguished by the registration of the rvient estate, or in any other manner.

*[*Sixth. Any conveyances, liens or other encumbrances made subsequent to the filing of the application for original registration and prior to the transcription of the decree for registration by the assistant recorder.*

Seventh. Any attachments on mesne process.]

40. Every decree of registration shall bear date of the year, day, hour and minute of its entry, and shall be signed by the recorder. It shall state whether the owner is married or unmarried, and if married the name of the husband or wife. If the owner is under disability it shall state the nature of the disability, and if a minor shall state his age. It shall contain a description of the land as finally determined by the court, and shall set forth the estate of the owner, and also, in such manner as to show their relative priority, all particular estates, mortgages, easements, liens, attachments and other encumbrances, including rights of husband or wife, if any, to which the land or the owner's estate is subject, and may contain any other matter properly to be determined in pursuance of this act. The decree shall be stated in a convenient form for transcription upon the certificates of title hereinafter mentioned.

41. Immediately upon the entry of the decree of registration the recorder shall send a certified copy thereof, under the seal of the court, to the register of deeds for the district or districts in which the lands lie, and the register as assistant recorder shall transcribe the decree in a book to be called the registration book, in which a leaf or leaves in consecutive order shall be devoted exclusively to each title. The entry made by the assistant recorder in this book in each case shall be the original certificate of title, and shall be signed by him and sealed with the seal of the court. All certificates of title shall be numbered consecutively, beginning with number one. The assistant recorder shall in each case make an exact duplicate of the original certificate, including the seal, but putting

* These two clauses are struck out by 1899, c. 131, s. 7.

on it the words, "Owner's duplicate certificate", and deliver
same to the owner, or to his attorney duly authorized. In case o
variance between the owner's duplicate certificate and the origi
certificate the original shall prevail. The certified copy of the dec
of registration shall be filed and numbered by the assistant record
with a reference noted on it to the place of record of the origi
certificate of title: provided, however, that when an applicat
includes land lying in more than one district the court shall ca
the part lying in each district to be described separately by me
and bounds in the decree of registration, and the recorder shall se
to the assistant recorder for each registry district a copy of
decree containing a description of the land within that district, a
the assistant recorder shall register the same and issue an owne
duplicate therefor, and thereafter for all matters pertaining to reg
tration under this act the portion in each district shall be treated
a separate parcel of land.

42. The certificate first registered in pursuance of a decree
registration in regard to any parcel of land shall be entitled in t
registration book, "Original certificate of title, entered pursuant
decree of the court of registration, dated at" (stating time and pla
of entry of decree and the number of the case). The certificat
shall take effect from the date of the transcription of the decre
Subsequent certificates relating to the same land shall be in li
form, but shall be entitled "Transfer from No. " (the number of t
next previous certificate relating to the same land), and also the word
"Originally registered" (date, volume and page of registration).

43. Where two or more persons are registered owners as t
nants in common, or otherwise, one owner's duplicate certificate ma
be issued for the whole land or a separate duplicate may be issue
to each for his undivided share.

44. A registered owner holding one duplicate certificate fo
several distinct parcels of land may surrender it, with the approv
of the court, and take out several certificates for portions thereo
So a registered owner holding separate duplicate certificates fo
several distinct parcels may surrender them, and, with like approva
take out a single duplicate certificate for the whole land, or seven
certificates for different portions thereof. Any owner subdividin
a tract of registered land into lots shall file with the recorder a pla
of such land, when applying for a new certificate or certificates, an
the court before issuing the same shall cause the plan to be verifie
and require that all boundaries, streets and passageways shall b
distinctly and accurately delineated thereon.

45. The obtaining of a decree of registration and the entry of
certificate of title shall be regarded as an agreement running with th
land, and binding upon the applicant and all his successors in tit
that the land shall be and forever remain registered land, and sub
ject to the provisions of this act and of all acts in amendment hereo

46. No title to registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession.

47. The original certificate in the registration book, any copy thereof duly certified under the signature of the recorder or an assistant recorder, and the seal of the court, and also the owner's duplicate certificate, shall be received as evidence in all the courts of the Commonwealth, and shall be conclusive as to all matters contained therein, except so far as otherwise provided in this act.

48. Every certificate of title shall set forth the names of all the persons whose estates make up the estate in fee simple in the whole land, and duplicate certificates may be issued to each person, but the recorder or assistant recorder shall note in the registration book and on each duplicate, to whom such duplicate was issued.

49. The recorder, under the direction of the court, shall make and keep indexes of all applications and of all decrees of registration, and shall also index and classify all papers and instruments filed in his office relating to applications and to registered titles. The recorder shall also, under the direction of the court, cause forms of indexes and registration and entry books to be prepared for the use of the assistant recorders. The court shall prepare and adopt convenient forms of certificates of title, and shall also adopt general forms of memoranda to be used by the assistant recorders in registering the common forms of conveyance, and other instruments to express briefly their effect.

VOLUNTARY DEALING WITH LAND AFTER ORIGINAL REGISTRATION.

50. An owner of registered land may convey, mortgage, lease, charge or otherwise deal with the same as fully as if it had not been registered. He may use forms of deeds, mortgages, leases or other voluntary instruments like those now in use and sufficient in law for the purpose intended. But no deed, mortgage or other voluntary instrument, except a will and a lease for a term not exceeding seven years, purporting to convey or affect registered land, shall take effect as a conveyance or bind the land, but shall operate only as a contract between the parties, and as evidence of authority to the recorder or assistant recorder to make registration. The act of registration shall be the operative act to convey or affect the land, and in all cases under this act the registration shall be made in the office of the assistant recorder for the district or districts where the land lies.

51. Every conveyance, lien, attachment, order, decree, instrument or entry affecting registered land, which would under existing laws, if recorded, filed or entered in the registry of deeds, affect the real estate to which it relates shall, if registered, filed or entered in the office of the assistant recorder of the district where the real

COPY BOUND CLOSE IN CENTER

estate to which such instrument relates lies, be notice to all persons from the time of such registering, filing or entering.

52. No new certificate shall be entered or issued upon any transfer of registered land which does not divest the title in fee simple from the owner or some one of the registered owners. All interests in registered land less than an estate in fee simple shall be registered by filing with an assistant recorder the instrument creating or transferring or claiming such interest and by a brief memorandum thereof made by an assistant recorder upon the certificate of title, and signed by him. A similar memorandum shall also be made on the owner's duplicate. The cancellation or extinguishment of such interests shall be registered in the same manner.

53. Where the assistant recorder is in doubt upon any question, or where any party in interest does not agree as to the proper memorandum to be made in pursuance of any deed, mortgage or other voluntary instrument presented for registration, the question shall be referred to the court for decision, either on the certificate of the assistant recorder stating the question upon which he is in doubt, or upon the suggestion in writing of any party in interest; and the court, after notice to all parties and a hearing, shall enter an order prescribing the form of memorandum to the assistant recorder, who shall make the registration in accordance therewith.

54. Every deed or other voluntary instrument presented for registration shall contain or have indorsed upon it the full name, place of residence, and post office address of the grantee or other person acquiring or claiming an interest under such instrument, and every deed shall also state whether the grantee is married or unmarried, and if married, give the name in full of the husband or wife. Any change in the residence or post office address of such person shall be indorsed by an assistant recorder on the original instrument, on receiving a sworn statement of such change. All names and addresses shall also be entered on all certificates. Notices and process issued in relation to registered land in pursuance of this act may be served upon any person in interest by mailing the same to the address so given, and shall be binding, whether such person resides within or without the Commonwealth.

55. No new certificate of title shall be entered, and no memorandum shall be made upon any certificate of title by the recorder or any assistant recorder, in pursuance of any deed or other voluntary instrument, unless the owner's duplicate certificate is presented with such instrument, except in cases expressly provided for in this act or upon the order of the court, for cause shown, and whenever such order is made a memorandum thereof shall be entered on the new certificate of title and on the owner's duplicate. The production of the owner's duplicate certificate whenever any voluntary instrument is presented for registration shall be conclusive authority from the registered owner to the recorder or any assistant recorder to

ater a new certificate or to make a memorandum of registration in ccordance with such instrument, and the new certificate or memoandum shall be binding upon the registered owner and upon all ersons claiming under him, in favor of every purchaser for value nd in good faith: provided, however, that in all cases of registraion procured by fraud the owner may pursue all his legal and quitable remedies against the parties to such fraud, without prejulice however to the rights of any innocent holder for value of a certificate of title; and provided, further, that after the transcription of the decree of registration on the original application any subsequent registration under this act procured by the presentation of a forged duplicate certificate, or of a forged deed or other instrument, shall be null and void. In case of the loss or theft of an owner's duplicate certificate notice shall be sent by the owner or by some one in his behalf to the assistant recorder for the district in which the land lies, as soon as the loss or theft is discovered.

56. Each assistant recorder shall keep an entry book in which he shall enter in the order of their reception all deeds and other voluntary instruments, and all copies of writs or other process filed with him relating to registered land. He shall note in such book the year, month, day, hour and minute of reception of all instruments, in the order in which they are received. They shall be regarded as registered from the time so noted, and the memorandum of each instrument when made on the certificate of title to which it refers shall bear the same date.

Every deed or other instrument, whether voluntary or involuntary, so filed with the recorder or assistant recorder, shall be numbered and indexed, and indorsed with a reference to the proper certificate of title. All records and papers relating to registered land in the office of the recorder or of any assistant recorder shall be opened to the public in the same manner as probate records are now open, subject to such reasonable regulations as the recorder, under the directions of the court, may make.

Duplicates of all deeds and voluntary instruments filed and registered may be presented with the originals, and shall be attested and sealed by the recorder or an assistant recorder, and indorsed with the file number and other memoranda on the originals, and may be taken away by the person presenting the same.

Certified copies of all instruments filed and registered may also be obtained at any time, on payment of the assistant recorder's fees.

CONVEYANCE IN FEE.

57. An owner desiring to convey in fee his registered land or any portion thereof shall execute a deed of conveyance, which the grantor or grantee may present to the assistant recorder in the district where the land lies. The grantor's duplicate certificate shall

be produced and presented at the same time. The assistant recor shall thereupon* make out in the registration book a new certific of title to the grantee, and shall prepare and deliver to him owner's duplicate certificate. The assistant recorder shall note up the original and duplicate certificates the date of transfer, the volu and page of the registration book where the new certificate is reg tered, and a reference by number to the last prior certificate. T grantor's duplicate certificate shall be surrendered, and the wo "cancelled" stamped upon it. The original certificate shall also stamped "cancelled". The deed of conveyance shall be filed a indorsed with the number and place of registration of the certific of title of the land conveyed.

58. When a deed in fee is for a part only of the land describ in a certificate of title the assistant recorder shall also enter a ne certificate and issue an owner's duplicate to the grantor for the pa of the land not included in the deed. In every case of transfer t new certificate or certificates shall include all the land described the original and surrendered certificates: provided, however, th no new certificate to a grantee of a part only of the land shall invalid by reason of the failure of the assistant recorder to enter a ne certificate to the grantor for the remaining unconveyed portion.

59. If at the time of any transfer there appears upon the regi tration book encumbrances or claims adverse to the title of t registered owner they shall be stated in the new certificate or cert ficates, exept so far as they may be simultaneously released discharged.

MORTGAGES.

60. The owner of registered land may mortgage the same b executing a mortgage deed, and such deed may be assigned, ex tended, discharged, released in whole or in part, or otherwise dea with by the mortgagee by any form of deed or instrument sufficien in law for the purpose. But such mortgage deed, and all instru ments assigning, extending, discharging and otherwise dealing wit the mortgage, shall be registered, and shall take effect upon th title only from the time of registration.

61. Resistration of a mortgage shall be made in the manne following, to wit: — The owner's duplicate certificate shall be pre sented to the assistant recorder with the mortgage deed, and he sha enter upon the original certificate of title and also upon the owner duplicate certificate a memorandum of the purport of the mortgag deed, the time of filing and the file number of the deed, and sha sign the memorandum. He shall also note upon the mortgage dee

* *The words* "in accordance with the rules and instructions of the Court" *are inserted by* 1899, c. 131, s. 8.

the time of filing and a reference to the volume and page of the registration book where it is registered.

The assistant recorder shall also, at the request of the mortgagee, make out and deliver to him a duplicate of the certificate of title, like the owner's duplicate, except that the words "Mortgagee's duplicate" shall be stamped upon it in large letters diagonally across its face. A memorandum of the issue of the morgagee's duplicate shall be made upon the original certificate of title.

62. Whenever a mortgage upon which a mortgagee's duplicate has been issued is assigned, extended or otherwise dealt with, the mortgagee's duplicate shall be presented with the instrument assigning, extending or otherwise dealing with the mortgage, and a memorandum of the instrument shall be made upon the mortgagee's duplicate certificate. When the mortgage is discharged or otherwise extinguished the mortgagee's duplicate certificate shall be surrendered and stamped "cancelled". The production of the mortgagee's duplicate certificate shall be conclusive authority to register the instrument therewith presented, subject however to all the provisions and exceptions contained in section fifty-six of this act so far as the same are applicable.

A mortgage on registered land may be discharged by the mortgagee in person on the registration book in the same manner as a mortgage on unregistered land may be discharged by an entry on the record book in the registry of deeds, and such discharge shall be attested by an assistant recorder.

63. Mortgages of registered land may be foreclosed like mortgages of unregistered land; but in case of foreclosure by entry and possession the certificate of entry required by section two of chapter one hundred and eighty-one of the Public Statutes shall be filed and registered by an assistant recorder within thirty days after the entry, in lieu of recording. After possession has been obtained by the mortgagee or his assigns, by entry or by action, and continued for the time required by law to complete the foreclosure, he or his assigns may petition the Court of Registration for the entry of a new certificate, and the court, after notice to all parties in interest, shall have jurisdiction to hear the cause, and may order the entry of a new certificate on such terms as equity and justice may require.

In case of foreclosure by action as provided in chapter one hundred and eighty-one of the Public Statutes, and by exercising the power of sale in the mortgage under the direction of the court as provided therein, a certified copy of the final decree of the court confirming the sale may be filed with the assistant recorder, after the time for appealing therefrom has expired, and the purchaser shall thereupon be entitled to the entry of a new certificate.

In case of foreclosure by exercising the power of sale without a previous decree of court the affidavit required by section eighteen of chapter one hundred and eighty-one of the Public Statutes shall

be filed and registered with the assistant recorder, in lieu of reco
ing. The purchaser at the foreclosure sale or his assigns n
thereupon at any time present the deed under the power of sale
the assistant recorder for filing and registration, and to obtain a n
certificate, the owner's duplicate certificate and the mortgagee's
plicate, if any, being first delivered up and cancelled: provide
however, that nothing contained in this act shall be construed
prevent the mortgagor or other person in interest from directly i
peaching, by bill in equity or otherwise, any foreclosure proceedin
affecting registered land, prior to the entry of a new certificate
title.

After a new certificate of title has been entered no judgment
covered on the mortgage note for any balance due thereon sh
operate to open the foreclosure or affect the title to registered la

LEASES.

64. Leases of registered land for a term of seven years or mo
shall be registered, in lieu of recording. A lessee's duplicate cer
ficate may be issued to the lessee upon his request, subject to t
provisions hereinbefore made in regard to a mortgagee's duplica
certificate, so far as the same are applicable.

TRUSTS.

65. Whenever a deed or other instrument is filed for the purpo
of transferring registered land in trust, or upon any equitable co
dition or limitation expressed therein, or for the purpose of creati
or declaring a trust or other equitable interest in such land witho
transfer, the particulars of the trust, condition, limitation or othe
equitable interest shall not be entered on the certificate; but a me
morandum thereof shall be entered by the words "in trust", or "upo
condition", or other apt words, and by a reference by number t
the instrument authorizing or creating the same. A similar me
morandum shall be made upon the duplicate certificate. The assistan
recorder shall note upon the original instrument creating or declar
ing the trust or other equitable interest a reference by number t
the certificate of title to which it relates, and to the volume an
page in the registration book where it is registered. If the instru
ment creating or declaring a trust or other equitable interest i
already recorded in the registry of deeds or of probate a certifie
copy may be filed by the assistant recorder and registered.

66. If the instrument creating or declaring a trust or othe
equitable interest contains an express power to sell, mortgage o
deal with the land in any manner, such power shall be stated in th
certificate of title by the words "with power to sell", or "wit
power to mortgage", and by apt words of description in case o
other powers. No instrument transferring, mortgaging or in an

way dealing with registered land held in trust shall be registered, unless the power thereto enabling is expressly conferred in the instrument of trust, or unless the decree of a court of competent jurisdiction on a bill for instructions or other proceeding has construed the instrument in favor of the power, in which case a certified copy of such decree may be filed with the assistant recorder, and he shall make registration in accordance therewith.

67. When a new trustee of registered land is appointed by the Supreme Judicial Court or the Superior or Probate Court, a new certificate shall be entered to him upon presentation to the assistant recorder of a certified copy of the decree and the surrender of the duplicate certificate.

68. Whoever claims an interest in registered land by reason of any implied or constructive trust shall file for registration a statement thereof with the assistant recorder. The statement shall contain a description of the land, and a reference to the number of the certificate of title and the volume and page of the registration book where it is entered. Such claim shall not affect the title of a purchaser for value and in good faith before its registration.

69. Any trustee shall have authority to file an application for registration of any land held in trust by him, unless expressly prohibited by the instrument creating the trust.

LEGAL INCIDENTS OF REGISTERED LAND.

70. Registered land, and ownership therein, shall in all respects be subject to the same burdens and incidents which attach by law to unregistered land. Nothing contained in this act shall in any way be construed to relieve registered land or the owners thereof from any rights incident to the relation of husband and wife, or from liability to attachment on mesne process or levy on execution, or from liability to any lien of any description established by law on land and the buildings thereon, or the interest of the owner in such land or buildings, or to change the laws of descent, or the rights of partition between coparceners and other cotenants, or the right to take the same by eminent domain, or to relieve such land from liability to be recovered by an assignee in insolvency under the provisions of law relating to preferences, or to change or affect in any way any other rights or liabilities created by law and applicable to unregistered land, except as otherwise expressly provided in this act or any amendment hereof.

ATTACHMENTS AND OTHER LIENS.

71. In every case where a writing of any description or a copy of any writ is required by law to be filed or recorded in the registry of deeds in order to create or preserve any lien, right or attachment, upon unregistered land, such writing or copy when intended to affect

registered land, in lieu of recording, shall be filed and registered in the office of the assistant recorder for the same registry district in which the land lies, and, in addition to any particulars required in such papers for recording with records of deeds, shall also, except in the case of attachment on mesne process, contain a reference to the number of the certificate of title of the land to be affected, and the volume and page of the registration book where the certificate is registered, and also, if the attachment, right or lien is not claimed on all the land in any certificate of title, a description sufficiently accurate for identification, of the land intended to be affected.

72. In every case where an attachment or other lien or adverse claim of any description is registered, and the duplicate certificate is not presented at the time of registration to the assistant recorder, he shall within twenty-four hours thereafter send notice by mail to the registered owner, stating that such paper has been registered, and requesting him to send or produce his duplicate certificate in order that a memorandum of the attachment, or other lien or adverse claim may be made thereon. If the owner neglects or refuses to comply within a reasonable time the assistant recorder shall suggest the fact to the court, and the court after notice shall enter an order to the owner to produce his certificate at a time and place to be named therein, and may enforce the order by suitable process.

73. Attachments on mesne process and liens of every description upon registered land shall be continued, reduced, discharged and dissolved by any method sufficient in law to continue, reduce, discharge or dissolve like liens on unregistered land. All certificates or other instruments which are permitted or required by law to be recorded in the registry of deeds to give effect to the continuance, reduction, discharge or dissolution of attachments or other liens upon unregistered lands, or to give notice of such continuance, reduction, discharge or dissolution, shall in the case of like liens upon registered land be filed with the assistant recorder and registered in the registration book, in lieu of recording.

74. All the provisions of law now in force relating to attachments of real estate and leasehold estates on mesne process shall apply to registered land, except that the duties required to be performed by the register of deeds shall be performed by the assistant recorder for the registry district where the land lies, who, in lieu of recording, shall register the facts now required to be recorded, and for that purpose shall keep books similar to those now required to be kept for attachments by registers of deeds, and the fees for registering attachments shall be the same as are now provided for recording.

75. The name and address of the plaintiff's attorney shall in all cases be indorsed upon the writ, where an attachment is made, and he shall be deemed to be the attorney of the plaintiff until written

notice that he has ceased to be such shall be filed for registration by the plaintiff.

76. Whenever an attachment on mesne process is continued, reduced, dissolved or otherwise affected by an order, decision or judgment of the court in which the action or proceeding in which said attachment was made is pending, or by any order of a court of insolvency, a certificate of the entry of such order, decision or judgment from the clerk or register and under the seal of the court, shall be entitled to be registered on presentation to the assistant recorder. A like certificate of the allowance by the court of an amendment which a subsequent attaching creditor or purchaser contends had the effect of dissolving an attachment, may be registered as an amendment allowed, but shall not be conclusive of dissolution, unless the court in which the action or suit is pending adjudicates that the amendment dissolved the attachment, in which case a certificate of the order, as soon as it becomes absolute, shall be registered as a dissolution of the attachment.

77. When a mechanic's lien or lien for labor and materials is claimed upon registered and unregistered land, and the original statement required by section six of chapter one hundred and ninety-one of the Public Statutes and amendments thereof is deposited with the register of deeds and recorded, an attested copy of such statement shall be filed with the assistant recorder and registered.

78. A lien of any description upon registered land shall be enforced in the same manner as like liens upon unregistered land. Whenever registered land is set off or sold on execution; or taken or sold for taxes, or for any assessment; or sold to enforce a lien for labor or materials; or the lien of a mortgagee or cotenant arising from a payment of taxes; or for an assessment under sections eleven to thirteen of chapter fifty-one of the Public Statutes or any act in amendment thereof; or for costs and charges for taking down dangerous structures under section seventeen of chapter four hundred and eighty-one of the acts of the year eighteen hundred and ninety-four or any act in amendment thereof; or for erecting fences along the line of a railroad corporation under section one hundred and sixteen of chapter one hundred and twelve of the Public Statutes; or for improving meadows and swamps under sections four to seven of chapter one hundred and eighty-nine of the Public Statutes; or for flowing land under section twenty-two of chapter one hundred and ninety of the Public Statutes; or for any costs and charges incident to such liens; any execution, or copy of the execution, any officer's return, or any deed, demand, certificate or affidavit or other instrument made in the course of proceedings to enforce such liens and required by law to be recorded in the registry of deeds in the case of unregistered land, shall be filed with the assistant recorder for the district where the land lies, and registered in the registration

book, and a memorandum made upon the proper certificate of title in each case as an adverse claim or encumbrance.

79. Upon the expiration of the time allowed by law for redemption after registered land has been set off or sold on any execution, or taken or sold for the enforcement of any lien of any description, the person claiming under an execution, or under any deed or other instrument made in the course of proceedings to levy such execution or enforce any lien, may petition the court for the entry of a new certificate to him, and the application may be granted: provided, however, that every new certificate entered under this section shall contain a memorandum of the nature of the proceeding on which it is based; and provided, further, that where a new certificate is entered in pursuance of any tax title such certificate shall contain a memorandum that it is subject to the rights of redemption reserved in sections fifty-seven and seventy-six of chapter three hundred and ninety of the acts of the year eighteen hundred and eighty-eight or any acts in amendment thereof or in substitution therefor, and provided, further, that at any time prior to the entry of a new certificate the registered owner may pursue all his legal and equitable remedies to impeach or annul proceedings under executions or to enforce liens of any description.

PENDING SUITS, JUDGMENTS, DECREES AND PARTITIONS.

80. No writ of entry, petition for partition, or other action at law, or any proceeding in equity affecting the title to real estate or the use and occupation thereof or the buildings thereon, and no judgment or decree, nor any writ of error, bill of review or other proceeding to vacate or reverse any judgment or decree, shall have any affect upon registered land as against persons other than the parties thereto, unless a memorandum like that described in section thirteen of chapter one hundred and twenty-six of the Public Statutes and amendments thereof, containing also a reference to the number of the certificate of title of the land affected, and the volume and page of the registration book where it is entered, shall be filed and registered. This section shall not apply to attachments, levies of execution, or to proceedings for the probate of wills, or for administration, in the probate court; provided, however, that in case notice of the pendency of the action has been duly registered it shall be sufficient to register the judgment or decree in such action within sixty days after the rendition thereof.

81. At any time after final judgment or decree in favor of the defendant, or other disposition in the manner specified in section fourteen of chapter one hundred and twenty-six of the Public Statutes, of any case in which the memorandum has been registered as provided in the preceding section, a certificate of the clerk stating the

manner of disposal thereof, as provided in said section fourteen, shall be entitled to registration.

82. Whenever in any real action affecting registered land judgment is entered for the plaintiff or demandant, except in actions of ejectment and actions under chapter one hundred and seventy-five of the Public Statutes, relating to terms of less than seven years, such judgment shall be entitled to registration on presentation of a certificate of the entry thereof from the clerk of the court where the action is pending, to the assistant recorder, who shall enter a memorandum upon the certificate of title of the land to which such judgment relates. If the judgment does not apply to all the land described in the certificate of title the certificate of the clerk and the memorandum entered by the assistant recorder shall contain a description of the land affected by the judgment.

83. When in any writ of entry an execution or writ of seisin has been issued and served by the officer he shall cause an attested copy of the execution, with a return of his doings thereon, to be filed and registered within three months after the service and before the return of the execution into the clerk's office, and the demandant, in case the judgment was that he was entitled to an estate in fee simple in the demanded premises, or in any part thereof, and for which execution issued, shall thereupon be entitled to the entry of a new certificate of title: provided, that in informations under chapter one hundred and eighty-two of the Public Statutes the Commonwealth shall be entitled to have the certificate of the registered owner cancelled by the Court of Registration as soon as judgment is rendered in its favor.

84. When in a writ of dower judgment is entered confirming the report of the commissioners under section seven of chapter one hundred and seventy-four of the Public Statutes, or when in a writ of waste judgment is entered that the plaintiff recover the place wasted, a certificate of the entry of such judgment may be registered as an encumbrance.

85. Any decree of a court of equity affecting title or rights in registered land, whether made in the exercise of general equity jurisdiction, or in the exercise of jurisdiction conferred by statute for the quieting of titles or removing clouds from titles, as in chapter two hundred and thirty-seven of the acts of the year eighteen hundred and eighty-two, chapter two hundred and eighty-three of the acts of the year eighteen hundred and eighty-five, chapter four hundred and forty-two of the acts of the year eighteen hundred and eighty-nine, and chapter three hundred and forty of the acts of the year eighteen hundred and ninety-three, or for any similar purpose, may be registered in the same manner as a judgment at law. But every court of equity passing such a decree shall, upon application of the plaintiff or petitioner, order any parties before it to execute for registration any deed or instrument necessary to give effect to its decree, and

may require the registered owner to deliver his duplicate certificate to the plaintiff or petitioner to be cancelled or to have a memorandum entered upon it by the assistant recorder. In case the person required to execute any deed or other instrument necessary to give effect to the decree is absent from the Commonwealth, or is a minor, or insane, or for any reason not amenable to the process of the court, the court may appoint some suitable person a trustee to execute such instrument, and the same when executed shall be registered and shall have full force and effect to bind the land to be affected thereby.

86. In all proceedings for partition of registered land, or for the assignment in fee of registered land claimed by husband or wife by statutory right, after the entry of the final judgment or decree of partition and the acceptance of the report of the commissioners, a copy of the judgment or decree and of the return of the commissioners, certified by the clerk or register, as the case may be, shall be filed and registered; and thereupon, in case the land is set off to the owners in severalty, any owner shall be entitled to have a certificate entered of the share set off to him in severalty, and to receive an owner's duplicate therefor. In case the land is ordered by the court to be sold the purchaser or his assigns shall be entitled to have a certificate of title entered to him or them on presenting the deed of the commissioners for registration: provided, however, that any new certificate entered in pursuance of partition proceedings, whether by way of set off or of sale, shall contain a reference to the final judgment or decree of partition, and shall be conclusive as to the title to the same extent and against the same persons as such judgment or decree is made conclusive by the statutes applicable thereto; and provided, also, that any person holding such certificate of title or a transfer thereof shall have the right to petition the court at any time to cancel the memorandum relating to such judgment or decree, and the court, after notice and hearing, may grant the application. Such certificate shall thereafter be conclusive in the same manner and to the same extent as other certificates of title.

87. When a certified copy of a judgment or decree for partition and of the return of the commissioners is presented for registration, if a mortgage or lease affecting a specific portion or an undivided share of the premises had previously been registered, the tenant claiming under the mortgagor or lessor shall cause the mortgage or lease and any duplicate certificate of title issued to the mortgagee or lessee to be again presented for registration, and the assistant recorder shall indorse on each a memorandum of such partition, with a description of the land set off in severalty on which such mortgage or lease remains in force. Such tenant shall not be entitled to receive his own duplicate certificate of title until such mortgage or lease has been so presented for registration.

INSOLVENCY.

88. It shall be the duty of the messenger to register notice of the issuing of a warrant in insolvency against a debtor who is an owner of registered land, when the same is committed to him, by filing a copy thereof with the assistant recorder.

An assignee in insolvency shall be entitled to the entry of a new certificate of registered land of the debtor upon presenting and filing a certified copy of the assignment, with the insolvent's duplicate certificate of title; but the new certificate shall state that it is entered to him as assignee in insolvency.

89. Whenever proceedings in insolvency against a registered owner of which notice has been registered are vacated by decree, or when the court of insolvency grants a discharge and orders a reconveyance of land to an insolvent debtor in proceedings under chapter two hundred and thirty-six of the acts of the year eighteen hundred and eighty-four and acts in amendment thereof, a certified copy of the decree, or of such discharge and order, may be filed and registered. If a new certificate has been entered to the assignee in insolvency as registered owner the debtor shall be entitled to the entry of a new certificate to him, and the certificate of the assignee shall be surrendered.

EMINENT DOMAIN.

90. Whenever any land of a registered owner, or any right or interest therein, is taken by eminent domain, the Commonwealth or body politic or corporate or other authority excercising such right shall file for registration in the proper registry district a description of the registered land so taken, giving the name of each owner thereof, referring by number and place of registration in the registration book to each certificate of title, and stating what estate or interest in the land is taken, and for what purpose. A memorandum of the right or interest taken shall be made on each certificate of title by the assistant recorder, and where the fee simple is taken a new certificate shall be entered to the owner for the land remaining to him after such taking. In any case where the owner has a lien upon the land taken for his damages it shall be so stated in the memorandum of registration. All fees on account of any memorandum of registration or entry of new certificates shall be paid by the Commonwealth or body politic or corporate or other authority taking the land.

91. When for any reason, by operation of law, land which was taken for public use reverts to the owner from whom it was taken or to his heir or assigns, the court upon the petition of the person entitled to the benefit of the reversion, after notice and hearing, may order the entry of a new certificate of title to him.

TRANSFER BY DESCENT AND DEVISE.

92. Upon the death of a registered owner his heirs at law or devisees on the expiration of thirty days after the entry of a decree of the Probate Court granting letters testamentary or of administration, or in case of an appeal from such a decree, at any time after the entry of a final decree, may file a certified copy of the final decree of the Probate Court and of the will, if any, with the assistant recorder, and make application for the entry of a new certificate. The court shall issue notice to the executor and administrator and all other persons in interest, and may also give notice by publication in such newspaper or newspapers as it may deem proper, to all whom it may concern, and after hearing may direct the entry of a new certificate or certificates to the person or persons entitled as heirs or devisees. Any new certificate so entered before the final settlement of the estate of the deceased owner in the Probate Court shall state expressly that it is entererd by transfer from the last certificate by descent or devise, and that the estate is in process of settlement. After the final settlement of the estate in the Probate Court, or after the expiration of the time allowed by law for bringing an action against an executor or administrator by creditors of the deceased, the heirs at law or devisees may petition the court for an order to cancel the memorandum upon their certificate, stating that the estate is in course of settlement, and the court, after notice and hearing, may grant the petition: provided, however, that the liability of heirs or devisees of registered land for claims against the estate of the deceased shall not in any way be diminished or changed.

93. Nothing contained in this act shall in any way affect or impair the jurisdiction of the Probate Court to license an executor or administrator or guardian to sell or mortgage registered land for any purpose for which a license may be granted in the case of unregistered land. The purchaser or mortgagee taking a deed excecuted in pursuance of such license shall be entitled to a new certificate of title, or memorandum of registration, on presenting his deed to the assistant recorder.

ASSURANCE FUND.

94. Upon the original registration of land under this act, and also upon the entry of a certificate showing title as registered owners in heirs or devisees, there shall be paid to the recorder one tenth of one per cent. of the assessed value of the real estate, on the basis of the last assessment for municipal taxation, as an assurance fund.

95. All money received by the recorder under the preceding section shall be paid to the treasurer of the Commonwealth. He shall keep the same invested, with the advice and approval of the governor and council, and shall report annually to the general court the condition and income thereof.

96. Any person who without negligence on his part sustains loss or damage, or is deprived of land or of any estate or interest therein after the original registration of land under this act, by the registration of any other person as owner of such land or of any estate or interest therein, through fraud or in consequence of any error, omission, mistake or misdescription in any certificate of title or in any entry or memorandum in the registration book, may bring and prosecute an action of contract in the Superior Court for the recovery of compensation for such loss or damage or for such land or estate or interest therein from the assurance fund: provided, however, that where the person deprived of land or of any estate or interest therein in the manner above stated has right of action or other remedy for the recovery of the land or of the estate or interest therein, he shall exhaust such right of action or other remedy before resorting to the action of contract herein provided; and provided, further, that nothing in this act shall be construed to deprive the plaintiff of any action of tort which he may have against any person for such loss or damage, or deprivation of land or of any estate or interest therein. But if the plaintiff elects to pursue his remedy in tort, and also brings an action of contract under this act, the action of contract shall be continued to await the result of the action of tort.

97. If such action of contract is brought to recover for loss or damage or for deprivation of land or of any estate or interest therein, arising wholly through any fraud, negligence, omission, mistake or misfeasance of the recorder, assistant recorder or of any of the examiners of title, in the performance of executive or ministerial duties, or of any of the assistants or clerks of the recorder, in the performance of their respective duties, then the action shall be brought against the treasurer of the Commonwealth as sole defendant.

If such action is brought to recover for loss or damage or deprivation of land or of any estate or interest therein arising wholly through any fraud, negligence, omission, mistake or misfeasance of some person or persons other than the recorder, assistant recorder or the other officers and assistants above named, or arising jointly through the fraud, negligence, omission, mistake or misfeasance of such other person and the recorder, assistant recorder or other officers and assistants above named, then such action shall be brought against both the treasurer of the Commonwealth and such other person or persons, as joint defendants.

98. Where there are defendants other than the treasurer of the Commonwealth, and where judgment is entered for the plaintiff against the treasurer and against some or all of the other defendants, execution shall issue against the other defendants and be levied upon them. If the execution is returned unsatisfied in whole or in part, and the officer returning the same certifies that the amount due cannot be collected from the lands or goods of such other defendants, a justice of the Superior Court shall direct the clerk to certify to the

governor the amount due on the execution, and the governor shall draw his warrant therefor upon the treasurer of the Commonwealth, and the treasurer shall pay the amount out of the assurance fund without any further act or resolve making an appropriation therefor.

When in such action judgment for any reason cannot be entered against all or any of the other defendants it may be entered against the treasurer alone or against the treasurer and such of the other defendants as are found to be liable, and against whom judgment may lawfully be entered. Whenever judgment is entered against the treasurer of the Commonwealth alone, whether in a case where he is sole defendant or joint defendant with others, the justice of the Superior Court before whom the action is tried shall direct the clerk to transmit to the governor a certificate of the entry of judgment and of the amount due, and the treasurer shall pay the same upon the warrant of the governor, as above provided.

99. If the assurance fund at any time is not sufficient to meet the amount called for by such warrant of the governor the treasurer shall make up the deficiency from any funds in the treasury not otherwise appropriated; and in such case any sums thereafter received by the treasurer on account of the assurance fund shall be transferred to the general funds of the treasury, until the amount paid on account of the deficiency shall have been made up.

100. In every case where payment has been made by the treasurer of the Commonwealth under warrant from the governor the Commonwealth shall be subrogated to all rights of the plaintiff against any other parties or securities, and the treasurer shall enforce the same in behalf of the Commonwealth. Any sums so recovered by the treasurer shall be paid into the treasury of the Commonwealth to the account of the assurance fund.

101. The income of the assurance fund shall be added to the principal and invested, until said fund amounts to the sum of two hundred thousand dollars, and thereafter the income of such fund shall be used to defray, as far as may be, the expenses of the administration of this act, instead of being added to the fund and accumulated.

102. The assurance fund shall not be liable to pay for any loss damage or deprivation occasioned by a breach of trust, whether express, implied or constructive, by any registered owner who is a trustee, or by the improper exercise of any power of sale in a mortgage. Nor shall any plaintiff recover as compensation in an action of contract under this act more than the fair market value of the real estate at the time of the last payment to the assurance fund on account of the same real estate.

103. All actions of contract for compensation under this act by reason of any loss or damage or deprivation of land or any estate or interest therein shall be begun within the period of six years from the time when the cause of action accrued, and not afterwards:

provided, however, that the plaintiff in an action for the recovery of the land or estate or interest therein in accordance with section ninety-seven of this act may bring the action of contract for compensation within one year after the termination of such action; and provided, further, that the action of contract herein provided shall survive to the personal representative of the registered owner, unless barred in his lifetime, but the proceeds thereof shall be treated as real estate.

POWERS OF ATTORNEY.

104. Any person may by attorney procure land to be registered and convey or otherwise deal with registered land, but the letters of attorney shall be acknowledged and filed with the recorder or the assistant recorder of the proper registry district, and registered. Any instrument revoking such letters shall be acknowledged and registered in like manner.

LOST DUPLICATE CERTIFICATES.

105. If a duplicate certificate is lost or destroyed, or cannot be produced by a grantee, heir, devisee, assignee or other person, applying for the entry of a new certificate to him or for the registration of any instrument, a suggestion of the fact of such loss or destruction may be filed by the registered owner or other person in interest and registered. The court may thereupon, upon the petition of the registered owner or other person in interest, after notice and hearing, direct the issue of a new duplicate certificate, which shall contain a memorandum of the fact that it is issued in place of a lost duplicate certificate, but shall in all respects be entitled to like faith and credit as the original duplicate, and shall thereafter be regarded as the original duplicate for all the purposes of this act.

ADVERSE CLAIMS.

106. Whoever claims any right or interest in registered land adverse to the registered owner arising subsequent to the date of original registration may, if no other provision is made in this act for registering the same, make a statement in writing setting forth fully his alleged right or interest, and how or under whom acquired, and a reference to the volume and page of the certificate of title of the registered owner, and a description of the land in which the right or interest is claimed. The statement shall be signed and sworn to, and shall state the adverse claimant's residence, and designate a place at which all notices may be served upon him. This statement shall be entitled to registration as an adverse claim, and the court, upon the petition of any party in interest, shall grant a speedy hearing upon the question of the validity of such adverse claim, and shall enter such decree thereon as justice and equity may require. If the

claim is adjudged to be invalid the registration shall
If in any case the court after notice and hearing shal
claim thus registered was frivolous or vexatious it
adverse claimant double costs.

SURRENDER OF DUPLICATE CERTIFICATES.

107. In every case where the recorder or any assis
is requested to enter a new certificate in pursuance o
ment purporting to be executed by the registered ow
reason of any instrument or proceedings which divest
the registered owner agains this consent, if the outstan
duplicate certificate is not presented for cancellation
request is made, the recorder or assistant recorder shall
new certificate, but the person claiming to be entitled t
apply by petition to the court. The court, after hearing
the registered owner or any person withholding the du
tificate to surrender the same, and direct the entry of a
cate upon such surrender.

If in any case the person withholding the duplicate c
not amenable to the process of the court, or if for any
outstanding owner's duplicate certificate cannot be delive
court may by decree annul the same, and order a new c
title to be entered. Such new certificate and all duplica
shall contain a memorandum of the annulment of the o
duplicate.

If in any case an outstanding mortgagee's or lessee's
certificate is not produced and surrendered when the m
discharged or extinguished or the lease is terminated, lik
ings may be had to obtain registration as in the case of
production of an owner's duplicate.

AMENDMENT AND ALTERATION OF CERTIFICATES OF T

108. No erasure, alteration or amendment shall be m
the registration book after the entry of a certificate of tit
memorandum thereon and the attestation of the same by th
or an assistant recorder, except by order of the court. A
tered owner or other person in interest may at any time
petition to the court, upon the ground that registered in
any description, whether vested, contingent, expectant or
have terminated and ceased; or that new interests have arise
created which do not appear upon the certificate; or that a
omission or mistake was made in entering a certificate or
morandum thereon, or on any duplicate certificate; or that
of any person on the certificate has been changed; or that t
tered owner has been married, or if registered as married
marriage has been terminated; or that a corporation whi

registered land and has been dissolved has not conveyed the same within three years after its dissolution; or upon any other reasonable ground; and the court shall have jurisdiction to hear and determine the petition after notice to all parties in interest, and may order the entry of a new certificate, the entry or cancellation of a memorandum upon a certificate, or grant any other relief upon such terms and conditions, requiring security if necessary, as it may deem proper: provided, however, that this section shall not be construed to give the court authority to open the original decree of registration, and that nothing shall be done or ordered by the court which shall impair the title or other interest of a purchaser holding a certificate for value and in good faith, or his heirs or assigns, without his or their written consent.

Any petition filed under this section and all petitions and motions filed under the provisions of this act after original registration shall be filed and entitled in the original case in which the decree of registration was entered.

SERVICE OF NOTICES AFTER REGISTRATION.

109. All notices required by or given in pursuance of the provisions of this act by the recorder or any assistant recorder, after original registration, shall be sent by mail to the person to be notified at his residence and post office address as stated in the certificate of title, or in any registered instrument under which he claims an interest, in the office of the recorder or assistant recorder, relating to the parcel of land in question.

All notices and citations directed by special order of the court under the provisions of this act, after original registration, may be served in the manner above stated, and the certificate of the recorder shall be conclusive proof of such service: provided, however, that the court may in any case order different or futher service, by publication or otherwise.

FEES FOR REGISTRATION.

110. The fees payable under this act shall be as follows:

For every application to bring land under this act, including indexing and recording the same, and transmitting to recorder, when filed with assistant recorder, three dollars.

For every plan filed, seventy-five cents.

For indexing an instrument recorded while application for registration is pending, twenty-five cents.

For examining title, five dollars, and one tenth of one per cent. of the value of the land.

For each notice by mail, twenty-five cents, and the actual cost of printing.

For all services by a sheriff under this act, the same fees now provided by law for like services.

For each notice by publication, twenty-five cents, and the cost of publication.

For entry of order dismissing application, or decree of regis and sending memorandum to assistant recorder, one dollar.

For copy of decree of registration, one dollar.

For entry of original certificate of title and issuing one du certificate, three dollars.

For making and entering a new certificate of title includin of one duplicate certificate, one dollar.

For each additional duplicate certificate, after the first, fifty

For the registration of every instrument, whether single duplicate or triplicate, including entering, indexing and filing and attesting registration thereof, and also making and attestin of memorandum on one instrument or on a duplicate certificate required, one dollar and fifty cents.

For making and attesting copy of memorandum on each tional instrument or duplicate certificate if required, fifty cents

For filing and registering an adverse claim, three dollars.

For entering statement of change of residence or post-office ad including indorsing and attesting same on a duplicate certi twenty-five cents.

For entering any note in the entry book or in the regist book, twenty-five cents.

For the registration of a suggestion of death or notice of is a warrant in insolvency, twenty-five cents.

For the registration of a discharge or release of mortgage or instrument creating an encumbrance, fifty cents.

For the registration of a memorandum or certificate of ent possession or deposition in proof thereof, fifty cents.

For the registration of any levy, or of any discharge or di tion of any attachment or levy, or of any certificate of or re for payment of taxes, or of any mechanic's lien or lien for lab materials, or notice of any pending action or of a judgment cree, fifty cents.

For indorsing on any mortgage, lease or other instrument a m randum of partition, one dollar.

For every petition filed under this act after original registra one dollar.

For a certified copy of any decree or registered instrument same fees as are provided by law for registers of deeds.

In all cases not expressly provided for by law, the fees of all lic officers for any official duty or service under this act shall the same rate as those prescribed herein for like services.

PENALTIES.

111. Certificates of title and duplicate certificates issued under this act shall be subjects of larceny.

112. Whoever knowingly swears falsely to any statement required to be made under oath by this act shall be guilty of perjury, and liable to the statutory penalties for perjury.

113. A certificate of title, duplicate certificate of title, certificate issued in place of a duplicate certificate, the registration book, entry book, and all indexes provided for by this act, and the docket of the recorder, shall be treated as if specifically described and enumerated in section one of chapter two hundred and four of the Public Statutes, and the various acts therein described, when done in reference to the records or instruments hereinbefore mentioned, shall be punished as provided in said section and chapter.

114. Whoever forges or procures to be forged, or assists in forging, the seal of the Court of Registration, or stamps or procures to be stamped, or assists in stamping, any document with such forged seal, or with the genuine seal of the Court of Registration without being duly authorized thereto, shall be punished by imprisonment in the state prison not exceeding ten years, or in the jail not exceeding two years.

115. Whoever, with intent to defraud, sells and conveys registered land knowing that an undischarged attachment or any other encumbrance exists thereon which is not noted by memorandum on the duplicate certificate of title, without informing the grantee of such attachment or other encumbrance before the consideration is paid, shall be punished by imprisonment in the state prison not exceeding three years, or in the jail not exceeding one year.

116. This act shall take effect upon the first day of October in the year eighteen hundred and ninety-eight. [*Approved June 23, 1898.*

Office Supreme Court U. S.
FILED
OCT 31 1900
JAMES H. McKENNEY,
Clerk

No. 213.

Add'l Brf. of Thorndike for P. E.

(17,656)

Filed Oct. 31, 1900.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1900

No. 213

WILLIAM B. TYLER . . . . PLAINTIFF IN ERROR

v.

THE JUDGES OF THE COURT OF REGISTRATION . . . . DEFENDANTS IN ERROR

IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

ADDITIONAL BRIEF FOR THE PLAINTIFF IN ERROR

UPON THE QUESTION OF JURISDICTION

J. L. THORNDIKE
Counsel

(17,656)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1900

No. 213

WILLIAM B. TYLER . . . PLAINTIFF IN ERROR

v.

THE JUDGES OF THE COURT OF REGISTRATION . . . . DEFENDANTS IN ERROR

IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

ADDITIONAL BRIEF FOR THE PLAINTIFF IN ERROR UPON THE QUESTION OF JURISDICTION

1. This case is brought here from a State Court, by writ of error under R.S. s. 709, as one in which the validity of a statute of the State was drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision of the State Court was in favor of its validity.

The plaintiff in error questioned the validity of the Land Registration Act on the ground that it was repugnant to the Constitution of the United States, and the decision of the State Court was that the Act was valid and not repugnant to the Constitution, and its decree was based on that decision.

The case was an application by the plaintiff in error to the State Court to prohibit proceedings in the Court of Registration to determine a question of boundary between him and certain persons who

had applied to register their land. The ground of his applicati was that the Land Registration Act, under which the proceedin were had, was unconstitutional *in toto*, because it was unconstit tional in two classes of provisions that were essential to the purpos for which the Act was passed. The provisions were (1) those b which the *original registration* was made conclusive upon all pe sons, and (2) those by which the *registration of subsequent dealing* was made conclusive upon all previously registered owners. Th plaintiff in error claimed that these provisions were such essentia parts of the system intended to be established by the Act, that, i they were invalid, the whole Act was also invalid, and the jurisdic tion given by it to the Court of Registration for the purposes of the Act failed. The objection to the provisions was that their effect in some cases would be to deprive *some* persons of their property with out due process of law. If those provisions were invalid on that ground, and it was essential to the purposes of the Act that all persons should be concluded by the proceedings in all cases, whether due process was employed or not, then the Act was wholly invalid and gave no jurisdiction to the Court of Registration. Any person that was brought before that court would be entitled, without regard to the process by which he was brought there, to object that it was an unconstitutional court without any jurisdiction whatever.

The grievance of the plaintiff in error was not that the process employed against him would not have been due process if the Court of Registration had been a competent court, but that an attempt was made to compel him to litigate the question of his boundary in an unconstitutional court which was without any jurisdiction to deal with it. His contention was that the provisions for determining the boundary between his land and the land to be registered were only an incident to the main purpose of the Act, which was to provide a new system of land transfer, by which the title to land included in certain specific boundaries should first be conclusively established by registration and should afterwards be dealt with by entries on the register having a like conclusive effect. If the parts of the Act could be separated from one another, and it was consistent with its purpose that the jurisdiction of the Court of Registration might be

exercised although some persons might, for want of due process, not be concluded, then the Act might stand in part, and nobody could object to the validity of the other parts unless he were deprived of his property without due process. But if the parts are not separable, and effect cannot be given to its principal purpose unless the rights of all persons are in all cases absolutely concluded by the registration, then the whole Act must stand or fall together, and anybody affected by it can object to its validity.

In the *Trade Mark Cases*, 100 U.S. 82, 98, it was held that a statute regarding trade marks, not limited to the cases in which Congress had power to legislate, was wholly void, although the particular case before the Court was one of those in which Congress might have legislated. The defendants were not required to show that their case was one to which the power of Congress did not extend.

In *State* v. *Guilbert*, 56 Ohio St. 575, where the Ohio registration of title act was held to be entirely invalid on the ground, among others, that some persons might be deprived of their property without due process of law, the case was an application for a mandamus against certain State officers to compel them to do certain things required by the Act for the purpose of carrying it into effect. There was no suggestion that they were to be deprived of property without due process, but they successfully maintained that the Act was unconstitutional on the ground that other persons might be so deprived of theirs.

The decision of the State Court was that (1) the provisions for original registration, and (2) the provisions relating to subsequent dealings with registered land, were valid and not repugnant to the Constitution of the United States or to that of the State, and on that ground refused a prohibition.

The State Court determined no other question, and its final decree rests wholly upon the decision of the constitutional questions, and it was necessary for that court to dispose of all of them in order to decide the case.

It is submitted therefore that the case should be dealt wi in accordance with the rules laid down by *Miller*, J., regardi jurisdiction of this Court to review cases in a State Court where Federal question is raised, in *Murdock* v. *Memphis*, 20 Wall. 636, viz.,

"2. That it [the Federal question] must have been decided by t State Court, or that its decision was necessary to the judgment or decre rendered in the case.

"3. That the decision must have been against the rights claimed asserted by plaintiff in error under the Constitution," &c.

"6. If it was erroneously decided against plaintiff in error, then th Court must further inquire whether there is any other matter or iss adjudged by the State Court, which is sufficiently broad to maintain th judgment of that court notwithstanding the error in deciding the iss raised by the Federal question. If this is found to be the case, th judgment must be affirmed without inquiring into the soundness of th decision on such other matter or issue.

"7. But if it be found that the issue raised by the question of Federa law is of such controlling character that its correct decision is necessary t any final judgment in the case, *or that there has been no decision by th State Court of any other matter or issue* which is sufficient to maintain th judgment of that court without regard to the Federal question, then this Court will reverse the judgment of the State Court, and will either render such judgment here as the State Court should have rendered, or remand the case to that court, as the circumstances of the case may require."

If the State Court had decided against the plaintiff in error on the ground that his objections to the validity of the act did not go to the whole act, but only affected it so far as it attempted to conclude the rights of persons without due process of law, the decision would have made it unnecessary to decide the Federal questions and would not have involved any question that could have been brought before this Court.

Chapman v. *Goodnow*, 123 U.S. 540, 548.
Castillo v. *McConnico*, 168 U.S. 674, 684.

If a writ of error had been brought in such circumstances, it would have had to be dismissed.

Eustis v. *Bolles*, 150 U.S. 361.

Remington Paper Co. v. Watson, 173 U.S. 443.

But as the State Court did not take that view of the Act, and rested its decree upon the decision of the Federal questions, they were properly brought to this Court by writ of error. It would be impossible to say that they were not material to a decision of the case, without taking a different view of the purpose of the Act from that on which the State Court acted. It is submitted therefore that the case is exactly within the rules laid down by *Miller*, J., as above-mentioned, in cases where a State Court has decided a Federal question against the plaintiff in error, and has not given a decision of any other matter sufficient to maintain its judgment without regard to the Federal question.

The decree of the State Court refusing the writ of prohibition was a final decree upon which a writ of error might be brought by R.S. s. 709, as in the similar case of an application for a mandamus.

Furman v. *Nichols*, 8 Wall. p. 56–57.

McPherson v. *Blacker*, 146 U.S. 1, 23.

2. In the original Brief for this plaintiff in error (p. 71) the reasons are given why the validity of the whole Act depends on the conclusiveness of both the original registration and the registration of subsequent dealings.

In addition to those reasons, reference may also be made to the original brief for the defendants in error (p. 8) where it is explained that the two *essential* and chief features of the system established by the Act are (1) the conclusive declaration of title, and (2) the method of subsequent transfer. It is also admitted at p. 36 of the same brief, that the purpose of the Act is not to furnish a new remedy by which titles may be quieted, but to establish a new system of transfer, and only as an incident to that purpose to settle

conclusively the state of the title upon the original registratio upon every transfer.

It is however urged for the defendants in error in the same (p. 82) that the 2nd objection, relating to the conclusiveness o registration of subsequent dealings with registered land, does go to the validity of the entire Act, and that the provision original registration might be upheld, although the provi regarding subsequent dealings were invalid.

This contention is contrary to the statements in the same just referred to, viz., that the provisions regarding the subseq dealings are one of the two essential features of the Act, and the only purpose of the original registration is to lay the founds for the new system of transfer.

The provisions for subsequent transfers are as essential to working of the Act as those for original registration, and non its purposes would be accomplished by the original registra unless subsequent transfers were to be effected as provided in It is impossible to believe that the legislature would have ena the parts relating to original registration without those relating subsequent transfers, for there would be no use of the original re tration unless the registration of subsequent dealings was to h the conclusive effect intended.

If the provisions concerning subsequent transfers were inva registered land could not be dealt with as if it were unregister for the Act itself forbids it. The Act provides (s. 29) that, a the original registration, "no deeds or other instruments relat solely to such land shall be recorded with the records of deeds, shall be registered in the registration book." And s. 50 provi that "no deed, mortgage," &c., "purporting to convey or aff registered land, shall take effect as a conveyance or bind the la but shall operate only as a contract between the parties," and " act of registration shall be the operative act to convey or aff the land"; and by ss. 39, 55, the registration of a transfer by t recorder is conclusive in favor of a *bona fide* purchaser. Accordi to these provisions registered land cannot be dealt with at all, if cannot be dealt with in the manner provided in the Act.

Moreover, as the State Court rested its decree upon its decision of a Federal question, it is submitted that it is not open to the defendants in error to contend in this Court that the question was not material, and that a different construction might be given to the State statute from that on which the State Court acted.

In *McPherson* v. *Blacker*, 146 U.S. p. 23, where a mandamus had been applied for in the State Court, it was said,

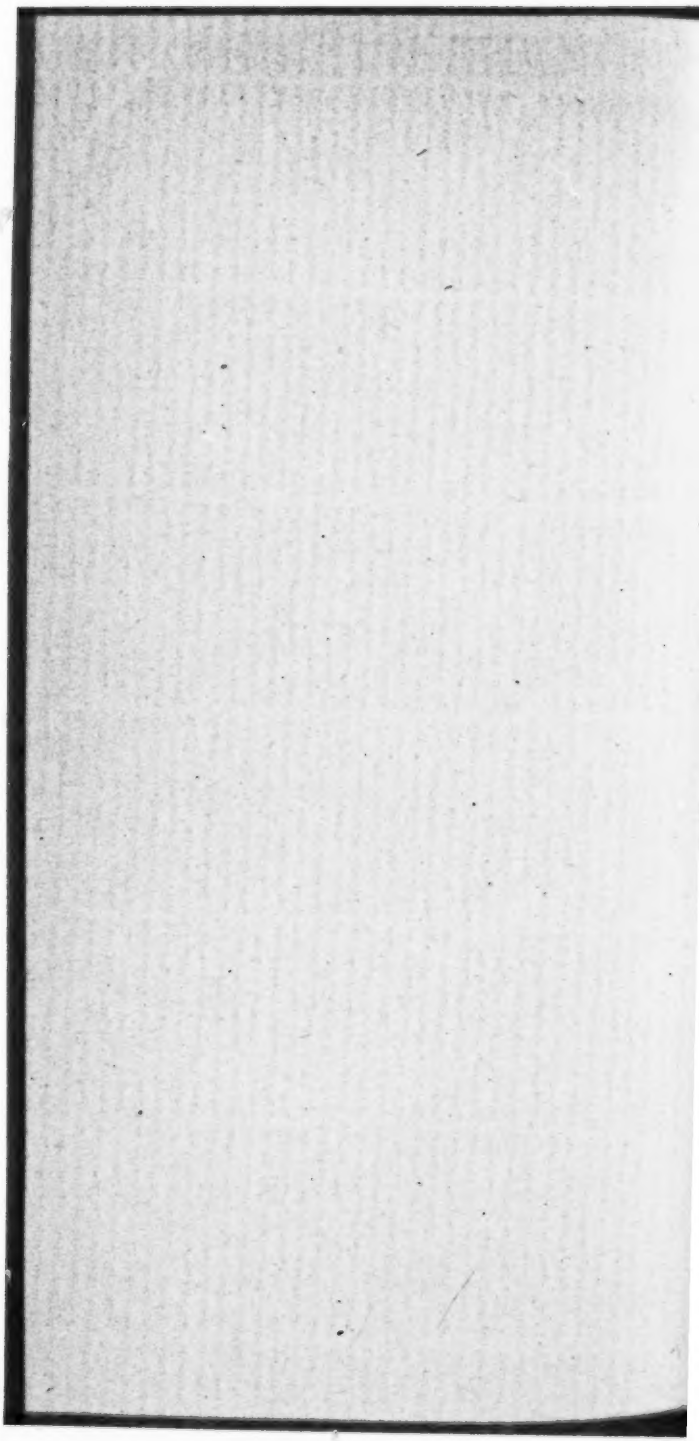
"The Supreme Court of Michigan held in effect that if the act in question were invalid, the proper remedy had been sought. In other words, if the court had been of opinion that the act was void, the writ of mandamus would have been awarded.

"And, having ruled all objections to the validity of the act urged as arising under the State constitution and laws adversely to the plaintiffs in error, the court was compelled to, and did, consider and dispose of the contention that the act was invalid because repugnant to the Constitution and laws of the United States.

"We are not authorised to revise the conclusions of the State Court on these matters of local law, and those conclusions being accepted, it follows that the decision of the Federal questions is to be regarded as necessary to the determination of the cause. *De Saussure* v. *Gaillard*, 127 U.S. 216."

And in a similar case, *Furman* v. *Nichol*, 8 Wall. p. 57–58, this Court said, "and unless the record discloses that the Supreme Court of Tennessee denied relief, on other than Federal grounds, it is perfectly manifest that we are compelled to take jurisdiction of this cause;" and, having decided the Federal question in favor of the plaintiffs in error, it reversed the judgment (p. 64), and directed that a judgment be entered awarding the writ of mandamus.

J. L. THORNDIKE.



215

Brief of Argument for D.

Filed Oct. 16, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 215.

WILLIAM B. TYLER, *Plaintiff in Error*,

v.

THE JUDGES OF THE COURT OF REGISTRATION.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE DEFENDANTS IN ERROR.

HOSEA M. KNOWLTON,
Attorney-General.

FRANKLIN T. HAMMOND,
Assistant Attorney-General.

23625

(17,656.)

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 213.

WILLIAM B. TYLER, *Plaintiff in Error*,

v.

THE JUDGES OF THE COURT OF REGISTRATION.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE DEFENDANTS IN ERROR.

HOSEA M. KNOWLTON,
Attorney-General.

FRANKLIN T. HAMMOND,
Assistant Attorney-General.

23624

CONTENTS.

	PAGE
BRIEF, ...	5
APPENDIX A:	
LAND REGISTRATION ACT OF MASSACHUSETTS, . . .	i
FORMS USED UNDER ACT, ...	xliv
INDEX TO ACT, ...	xlix
APPENDIX B:	
COPIES OF STATUTES, ...	lxi

23625

Supreme Court of the United States.

October Term, 1899.

No. 542.

William B. Tyler, Plaintiff in Error,

v.

The Judges of the Court of Registration.

BRIEF FOR THE DEFENDANTS IN ERROR.

Statement of the Case.

This was a petition for a writ of prohibition brought by the plaintiff in error in the Supreme Judicial Court of Massachusetts, alleging the following facts: —

David E. Gould and George H. Jones on Dec. 22, 1898, applied to the Massachusetts Court of Land Registration to have certain land in Everett, Massachusetts, brought under the operation of the Massachusetts Land Registration Act (St. 1898, c. 562), and to have their title thereto confirmed and registered. The land referred to was shown on a plan filed with the application. The petitioner was the owner of an estate in fee simple adjoining part of the land described in the application, and claimed that the boundary line between his land and the part aforesaid was not correctly shown on the plan filed with the application, but encroached upon and included part of his land. The petition prayed for a writ of prohibition to restrain the respondents, the judges of the Court of Land Registration, from further proceeding upon the application for registration, and alleged that the Land Registration Act under which the proceedings were held violated the provisions of the Constitution of the United

States and of the Constitution of the Commonwealth of Massachusetts in these particulars: —

(1) Because it attempted to deprive persons of their property without due process of law and otherwise than by the law of the land.

(2) Because it purported to give judicial powers to the recorder and assistant recorders therein mentioned, who were not judicial officers appointed and holding their offices as provided in the Constitution of the Commonwealth of Massachusetts in respect to judicial offices.

(3) Because it purported to give to the recorders and assistant recorders powers to deprive persons of their property in registered land without due process of law and otherwise than according to the law of the land.

Upon the petition and answer, together with the rules of the Court of Land Registration and a set of documents referred to in the answer (Record, p. 31), the case was reserved for the full court upon the only question raised at the hearing, — whether the Land Registration Act was constitutional. The full court on Jan. 3, 1900, decided that the act was constitutional, and by final decree, dated Feb. 9, 1900, the petition was dismissed. The case comes here on error to review this decree.

The plaintiff assigns as error that —

(1) The provisions of the Massachusetts Land Registration Act, whereby a decree of registration is made conclusive upon and against all persons as therein provided, are repugnant to the provision of the Fourteenth Amendment, that no state shall deprive any person of property without due process of law, and that

(2) The provisions of said act relating to transfers and dealings with registered land after original registration are repugnant to the said provision of the Fourteenth Amendment.

Introductory Remarks.

I.

The necessity for the Commonwealth of Massachusetts of a reform in its laws relating to the transfer of land is forcibly expressed in the following extract from the special message

23626

sent by Governor Russell on Feb. 17, 1891, to the Legislature of Massachusetts: —

"The need of some new system of land transfer is shown by the growing public dissatisfaction caused by the delays and expense attending our present system of registration of deeds. That system has existed in this Commonwealth for a little more than two hundred and fifty years. In former days, when our population was smaller, it apparently satisfied the popular demand; but with increase of population it has become less serviceable. Our people are now largely concentrated in cities and populous towns. The last national census shows that forty-seven cities and towns, having each more than eight thousand inhabitants, contain seventy per cent. of our whole population. The density of the population, with the greater subdivision of land and increase of real estate transactions which it involves, is reflected in the mass of records in our registries of deeds. The four containing the largest number of volumes are those of the Middlesex south district, of Suffolk County, of the Worcester district and of the Essex south district. These contain, respectively, at the present time [1891] 2,022, 1,979, 1,355 and 1,300 volumes.* The increase in the number of volumes in three of these registries during the period of thirty years, from the end of the year 1860 to the end of the year 1890, was as follows: in the Suffolk registry from 790 to 1,974 volumes, an increase of 150 per cent.; in the Middlesex south district registry, from 872 to 2,014 volumes, an increase of 131 per cent.; and in the Essex south district registry, from 617 to 1,297 volumes, an increase of 110 per cent. These figures indicate such a rapid growth in the mass of the records that at no distant day even the question of providing room for the records will be a matter of serious concern. But we are already met by the more serious difficulty, that the present mass of records is so great that much time and labor must be spent in searches in order to ascertain the transactions which affect the title to any piece of land. This causes delay and expense in completing trans-

* On Jan. 1, 1900, there where 2,656 volumes in Suffolk County. See pamphlet by J. T. Hassam on the registers of deeds for the county of Suffolk, in the proceedings of the Massachusetts Historical Society for March, 1900.

fers even if the most complete methods of indexing should be employed, so as to reduce to a minimum the time required in searching the records, and our present methods are by no means perfect. The delay and expense attending the present system form a serious tax upon purchasers and mortgagors of land which bears with special weight upon owners of small estates." *

II.

The statute in question in this case provides for what is commonly known as the Torrens system of registering title to land. The essential features of that system are the following: a judicial proceeding is instituted which ends in a decree declaring who is the owner of the land involved and what other interests, if any, there are in it. Before the decree is entered, however, an examination of the title is made by an official examiner, and notice of the proceedings is given to all persons interested. This decree serves as a declaration or root of title, which is conclusive upon all the world, back of which the courts will not go. The title to the land having been thus *conclusively declared*, it is provided that the usual methods of conveying or dealing with land or raising rights in land by deed or prescription shall not apply to such registered land, so called, but rights therein are to be transferred or created *only by the act of making a public record of such transfer or creation;* and this public record is so kept that the records which relate to one parcel of land are entered upon a single page in the registry book, which page shows, therefore, the actual state of the title at all times. The two chief features of the system are, therefore, (1) a conclusive declaration of the title to land by a decree made after an official examination and notice given to all persons interested, which decree, so to speak, "posts" the title up to date and declares absolutely and as against all the world the only rights which exist in the land, and (2) a change in the method of transfer and creation of rights in registered land, by which rights are transferred or created only by a public registration of the fact.

* See also "Land Transfer; a Reply to Criticisms of the Torrens System," J. R. Carret, 7 Harvard Law Review, 24; "Land Transfer Reform," 4 Harvard Law Review, 271; "Land Title Registration in Massachusetts," W. D. Turner, 33 American Law Review, 42.

23627

Another feature common to most of the Torrens statutes is the provision for an "assurance fund," so called. Each applicant for original registration is required to contribute to a fund which is used to make compensation, if necessary, to any person whose rights may be lost by fraud or mistake in registration. This provision was not contained in the original Torrens acts of England (25 & 26 Vict., cc. 53, 67; 38 & 39 Vict., c. 87), being first enacted in 1897 (60 & 61 Vict., c. 65, §§ 7, 21), and is not an essential feature of the Torrens system. It is contained, however, in the Massachusetts act.

The differences between the Torrens system and the system of registration of deeds which has been in operation in Massachusetts for about two hundred and fifty years are marked.

The object of the system of registering deeds is to give public notice of all instruments affecting the title to land. Conveyances are not valid except as between the parties and persons having actual notice unless they are recorded.* But written instruments constitute only one class of evidence of title. Many facts, such as marriage, death, capacity, execution, delivery, adverse possession, etc., which are outside the record, are essential to a claim of title.† The system of registering deeds does not result in the absolute ascertainment of title. One examining the records can see all the *conveyances* which he need look out for, but he cannot be sure that his title is unimpeachable on grounds arising independent of conveyances. As was said by one of the most eminent conveyancers in England, testifying before the Royal Commission in 1856: "Title by deed can never be demonstrated as an ascertained fact; it can only be presented as an inference more or less probable, deducible from the documentary evidence accessible at the time being."‡ Beside the fact that title can never be absolutely ascertained by examination under a system of registering deeds, there is the further disadvantage that upon each transfer a fresh examination has to be made and the whole ground has to be gone

* Pub. Sts., c. 120, § 4.
† Harvard Law Review, vol. 6, p. 302, and vol. 12, p. 24.
‡ Torrens Title Cases (Toronto), p. xii.

over again. Since there are different degrees of skill among conveyancers, purchasers are usually unwilling to take the opinion of counsel who has made a previous examination, but insist that an examination should be made by their own conveyancer. All these re-examinations involve expense and delay, which are generally needless.

Under the Torrens system not deeds but *titles* are registered. The actual state of the title at the time of original registration is declared with absolute certainty once for all. No re-examination is necessary because subsequent dealings do not take effect until they are noted on the register; and by the mere inspection of this the actual state of the title may be at any time quickly and easily ascertained. While under the system of registering deeds the conveyancer has some of the evidence of title before him and must investigate and form his own conclusion upon the title, under the Torrens system the title is declared with certainty. "In the one case he finds, so to speak, the sum worked out for him; in the other he has the figures given him and he has to work out the sum for himself." *

III.

A short history of the legislation embodying the Torrens system of land transfer in the various countries where it has been introduced is here given.

Continental Europe.

Although the system of registering titles embodied in the Massachusetts statute here involved is known to the English speaking world as the "Torrens system," taking its name from Robert Torrens, who first introduced it into Australia, in 1858, it has been in operation in parts of continental Europe for hundreds of years. Registers of ownership have existed from time immemorial in Bohemia. In Vienna, registers of 1368 are still preserved; in Prague, of 1377; in Munich, of 1440. In the Rhine provinces, Hanover and some of the remoter Austrian provinces, the present system of registering title was introduced comparatively recently.

* Report of committee of House of Commons (1878) on Land Titles and Transfers, quoted in Torrens Title Cases (Toronto), p. xxxviii.

23628

Registration of title was made universal in Austria in 1811; it was adopted in Saxony in 1843, in Hungary in 1849–56, and in Prussia in 1872.*

The variety of conditions under which the system is administered is best indicated from the following:*—

"The particular examples collected in the detailed report (accompanying the main report) include, for instance, such great estates as the ancestral domains of the Bohemian nobility (among whom are to be found some of the largest land owners in Europe), subject to the strictest entails, carrying political privileges of the highest importance, and especially registered in immense separate volumes in the provincial capital; they also include (by way of contrast) the tiny subdivisions of the peasant proprietors of the Rhine provinces, where the principles and practices of the Code Napoleon are still deeply rooted in the customs and feelings of the people. They include, on the one hand, specimens taken from the rapidly developing building properties in the suburbs of Berlin, with their villa residences and restrictive covenants, and, on the other, remote Silesian manors, with their tenant farmers, antique rights of common and commuted rents, and services dating from feudal times. They show the system as applied to vast, featureless plains, like the corn-growing regions of Hungary, to the busy mining and industrial districts of Saxony and the Black Country of Germany close to the Russian frontier, as well as to the picturesque Alpine hamlets and pastures, with their innumerable independent rights of way, water and other complicated easements, to be found in Syria and the Saltzkammergut; they pass from the intricacies of cellars and flats, courts and passages, of the Jews' quarter of the city of Prague, to the simple conditions of a quiet agricultural district in Brandenburg; from mortgages on first-class properties involving hundreds of thousands of pounds, and subject to the most complicated subsequent dealings by way of transfer, alteration, subdivision and collateral security, down to rows of petty

* Report of C. Fortescue Brickdale, Esq., assistant registrar of the land registry (England), made to the British government on the system of registration of titles now in operation in Germany and Austria-Hungary, 31 American Law Review, 827.

charges on diminutive shares in an inconsiderable estate; from great cities, where values are measured almost by the square inch, to trackless wastes and bare mountains of scarcely any value at all. Over the whole of this vast and diversified tract, embracing an area more than seven times the size of England and Wales, *systems of registration of title differing in no essential particular from the systems established under the Torrens Acts in Australia, and partially established under the Land Registry Acts in England and Ireland*, have been in almost universal operation for a considerable period, amounting in the principal Austrian provinces to upwards of eighty years, and in certain places dating from a much more remote period."

Australia.

Robert R. Torrens, a native of England and collector of customs at Adelaide, South Australia, being familiar with the transfer and mortgage of ships under the Merchant Shipping Act of 1854 (17 & 18 Vict. (Imp.), c. 104), conceived the idea of adapting the same system to transactions in land. He devised a scheme for this purpose which was enacted into law in 1858 in South Australia and is the original Torrens Title Act upon which all subsequent legislation of this description is founded.* Through the influence of Torrens the other Australian colonies, Victoria, New South Wales, Queensland, West Australia, Tasmania and New Zealand, quickly followed with similar acts.

The following is a table showing these acts: —

South Australia.

1858, 21–22 Vict., No. 15, The Real Property Act.

1858, 21–22 Vict., No. 16, An act to amend the Real Property Act.

1860, 23–24 Vict., No. 11, The Real Property Act of 1860. A consolidation and amendment of the foregoing.

1861, 24–25 Vict., No. 22, The Real Property Act of 1861.

1869–70, 33 Vict., No. 11, An act to amend the Real Property Act of 1861.

---

* 21–22 Vict., No. 15.

23629

1878, 41–42 Vict., No. 128, An act to amend the Real Property Act of 1861.

1881, 44–45 Vict., No. 223, An act to amend the Real Property Act of 1861.

1886, 49 & 50 Vict., No. 380, The Real Property Act of 1886. A consolidation of former acts.

1887, 50 & 51 Vict., No. 403, Amending previous act.

1893, 56 & 57 Vict., No. 569, Real Property Amendment Act, 1893.

Victoria.

1862, 25 Vict., No. 140, Real Property Act of 1862. Founded on South Australian Act of 1861.

1866, 29 Vict., No. 301, Transfer of Land Statute.

1867, 31 Vict., No. 317, Transfer of land (amendment).

1869, 33 Vict., No. 353, Transfer of land (dower).

1871, 35 Vict., No. 402, Transfer of land (amendment).

1878, 42 Vict., No. 610, Transfer of land (easement).

1885, 49 Vict., No. 835, Transfer of land (amendment).

1885, 49 Vict., No. 855, Transfer of land (survey boundaries).

1885, 49 Vict., No. 872, Transfer of land (amendment).

1887, 51 Vict., No. 945, Transfer of land (amendment).

1890, 54 Vict., No. 1149, Transfer of Land Act, 1890. Consolidates the prior statutes.

New South Wales.

1862, 26 Vict., No. 9, Real Property Act. Founded on South Australian acts, 1858–61.

1873, 36 Vict., No. 7, Amendment to act of 1862.

1878, 41 Vict., No. 18, Amendment to act of 1862.

1893, 56 Vict., No. 16, Conveyancer's Enabling Act.

Queensland.

1861–62, 25 Vict., No. 14, Real Property Act. Founded on South Australian act of 1861.

1877, 41 Vict., No. 18, Amending act of 1861–62.

1888, Consolidation of Queensland statutes.

West Australia.

1874, 38 Vict., No. 13, Transfer of Land Act.
1878, 42 Vict., No. 15, Amending act of 1874.
1879, 43 Vict., No. 17, Amending act of 1874.

Tasmania.

1862, 25 Vict., No. 16, Real Property Act.
1878, 42 Vict., No. 9, Real Property Act, 1878.
1883, 47 Vict., No. 19, Conveyancing and Law of Property Act.

New Zealand.

1870, 33–34 Vict., No. 51, Land Transfer Act.
1871, 34 Vict., No. 12, Amending 1870 act.
1874, 37 Vict., No. 15, Amending 1870 act.
1876, 39 Vict., No. 67, Amending 1870 act.
1880, 42 Vict., No. 8, Amending 1870 act.
1883, 46 Vict., No. 32, Amending 1870 act.
1885, 49 Vict., No. 57, Consolidation of prior acts.
1888, 52 Vict., No. 40, Amending 1885 act.
1889, 53 Vict., No. 29, Amending 1885 act.

GREAT BRITAIN.

The first act of this kind in England was Lord Westbury's act, so called.* Simultaneously the Declaration of Titles Act was passed,† and in 1865 "An act for the recording of titles in Ireland."‡

In 1875 the Land Transfer Act (Lord Cairn's act) was passed.§ In 1891, 54 & 55 Vict., c. 66, was passed, entitled "An act to establish local registries of titles to land in Ireland"; and in 1897 an act amendatory of the Land Transfer Act was passed.‖ Lord Cairn's act made the registration of title to land optional but not compulsory; but by 60 & 61 Vict., c. 65 (1897), it is provided that by order in council, to be published in the "London Gazette," the Queen

* 25 & 26 Vict., c. 53 (1862).
† 25 & 26 Vict., c. 67 (1862).
‡ 28 & 29 Vict., c. 88.
§ 38 & 39 Vict., c. 87.
‖ 60 & 61 Vict., c. 65.

23630

may declare that as to any county or part of a county registration of title to land is to be compulsory on sale, and in that case the title shall not pass until the transferee is registered as the proprietor of the land (§ 20). Under this provision compulsory registration has been extended to the county of London.* The original act of 1875 did not provide for any indemnity. The act of 1897 supplied this feature (§ 7).

Canada.

In British Columbia the Torrens system was introduced in 1870 (33 Vict., No. 17), although its principles were adopted in that section known as Vancouver Island as early as 1861.†

Various amendments have been made to this act.‡

In Ontario in 1885 the Land Titles Act was passed, founded on Lord Cairn's act. The following amendments have been made: 50 Vict., cc. 14, 15, 16; 51 Vict., c. 12, § 5; 52 Vict., c. 20; 53 Vict., c. 32; 55 Vict., c. 24; 56 Vict., cc. 22, 23; 58 Vict., c. 13, § 31.

In Manitoba the first statute enacting the Torrens system was 48 Vict., c. 28 (1885). This act was amended and the amending acts consolidated. (Revised Statutes of Manitoba, c. 133; 57 Vict., c. 30.)

United States.

In Illinois, a Torrens act was first passed in 1895 (L. of 1895, p. 107), but was held unconstitutional in *People* v. *Chase*, 165 Ill. 527. In 1897 another statute was passed, on the same subject (L. of 1897, p. 141), the constitutionality of which was upheld in *People* v. *Simon*, 176 Ill. 165.

In Ohio, an act was passed in 1896 intended to introduce the Torrens system (92 Ohio Laws, 220). This act was held unconstitutional in *State* v. *Guilbert*, 56 Ohio St. 575.

In California, a Torrens act was passed in 1897 (Sts. 1897, c. 110). It has not been the subject of any judicial decision.

In Massachusetts, the Torrens system was first dealt with

---

* "London Gazette," July 19, 1898, and Dec. 5, 1899.

† Report answering the Earl of Kimberly, British Blue Book (1881), vol. 64.

‡ 42 Vict., c. 22; 47 Vict., c. 17; 51 Vict., c. 17; 35 Vict., c. 31; 48 Vict., c. 17; Consolidated Acts, 1888, c. 67; 36 Vict., No. 21; 50 Vict., c. 18; 53 Vict., cc. 24, 25; 54 Vict., c. 16; 55 Vict., c. 26; 56 Vict., c. 23.

officially in 1891 by the late Gov. William E. Russell in his inaugural address, and afterwards in a special message to the Legislature, recommending the appointment of a special commission to investigate the subject and report a draft of an act. A joint special recess committee was thereupon appointed, which reported in favor of the adoption of the system. A draft of a bill was before the Legislatures of 1892 and 1893, and in the latter year a special commission was provided for by statute, in accordance with the recommendation of Governor Russell. Three prominent members of the bar were appointed commissioners. In March, 1894, they reported to the Legislature a majority and minority draft for a bill. Neither draft was enacted and the matter was referred to each succeeding Legislature until 1897, when by chapter 511 of the Acts of 1897 the governor was authorized to appoint a committee to draft another bill. Alfred Hemenway, Esq., of Boston was appointed sole commissioner, and on Jan. 3, 1898, he reported a draft of a bill to the Legislature which, with slight changes, was enacted as St. 1898, c. 562, entitled "An act to provide for registering and confirming titles to land." This act was amended by St. 1899, cc. 125, 131, and St. 1900, c. 354, and with such amendments is printed in full below.

IV.

The following is an outline of the provisions of the Massachusetts Land Registration Act: —

A court known as the Court of Land Registration is established (§ 2). An owner of land may apply to this court to have his land registered, and the title thereto confirmed (§ 19), accompanying his application with a plan of the land (§ 26), and thereupon the application is referred to an official examiner of titles, who searches the records and files a report stating his opinion upon the title (§ 30). Notice of the application is then given by order of the court by publication, mailing by registered letter and posting on the land, and in such other manner as the court may order (§ 32); and a notice of the application is recorded in the registry of deeds (§ 20). Proof of actual notice is required where possible

(§ 32). On the return day stated in the notice a guardian *ad litem* may be appointed for minors and all persons not in being, unascertained, unknown, or out of the Commonwealth (§ 33), and if no person appears, the court may order a general default, and may make a decree confirming the title and ordering it to be registered (§ 35). The decree describes the land and states the estate of the owner, and all incumbrances in the order of their priority (§ 40). This decree operates directly upon and binds the land and is conclusive upon all persons, including the Commonwealth, and is the basis for all subsequent dealing with the land (§ 38). A certified copy of the decree is transcribed into a record book, and is known as the original certificate of title (§ 41). An exact duplicate of this original certificate is given to the owner of the land, and is known as the owner's duplicate certificate (§ 41). The land thus becomes registered land. The owner of registered land holds it free from all incumbrances, except those stated on the certificate, and certain others enumerated in the act, not material to the questions raised (§ 39), and the original certificate in the registration book, or an attested copy, or the owner's duplicate certificate, is made evidence and conclusive of all matters contained therein in the courts of the Commonwealth (§ 47).

After land is registered it may be conveyed, mortgaged, leased, charged or otherwise dealt with as fully as though it were not registered (§ 50). The fee is conveyed in the following manner. The grantor makes an ordinary deed of conveyance, which he or the grantee presents, together with the grantor's duplicate certificate, to an official called the assistant recorder. The duplicate certificate is surrendered and stamped "cancelled." The deed of conveyance is filed with the assistant recorder, a new certificate of title is made out in the registration book to the grantee, and a new owner's duplicate certificate delivered to the grantee, which is conclusive as to the title in like manner as the original certificate. Incumbrances appearing on the old certificate are transferred and stated on the new (§§ 57–59).

Interests in registered land, less than estates in fee created voluntarily by the owner, are conveyed by making out forms of instruments now used (deeds, mortgages, leases, etc.).

These instruments are then filed with the assistant recorder, and a memorandum thereof is made on the original certificate, and a similar memorandum on the owner's duplicate, which is presented, and the memorandum is binding upon the registered owner and all persons claiming under him. No voluntary instrument takes effect as a conveyance, or binds the land, until registered (§§ 60, 61, 64).

Liens, claims and other dealings relating to registered land do not affect the title until such dealings are registered; and provision is made for registering attachments, claims for liens and other instruments and dealings intended to affect the title to registered land (§§ 71, 77).

On the death of a registered owner, upon application by his heirs-at-law or devisees, and upon notice and hearing, the court may direct the entry of a new certificate of title to the heirs or devisees, with a memorandum stating that the estate is in process of settlement; which memorandum, after notice and hearing on the petition, may be cancelled after the time for bringing actions against the estate has expired (§ 92).

On original registration, and on registration by descent or devise, one-tenth of one per cent. of the assessed value of the property at the last assessment is paid into the treasury of the Commonwealth. Money so paid is to be kept as an assurance fund by the treasurer, from which compensation may be recovered by a person sustaining loss or damage without his own negligence by the registration of interests in land through fraud, or in consequence of error in the certificate of title or memorandum (§§ 94–103).

Argument.

First Assignment of Error.

The point taken by the first assignment in error is that the provisions of the statute relating to proceedings for initial registration of title are unconstitutional because they provide for depriving persons of property without due process of law (Record, p. 31).

23632

I.

It has been settled beyond all controversy by decisions of this court that as to land within its limits the government of a state has exclusive power to regulate the tenure, the method of acquisition and transfer, the law of its descent and the extent of the right of testamentary disposition. As to the right of a state to provide means for ascertaining the title to land within its limits this court, speaking through Mr. Justice Brewer, said in *Arndt* v. *Griggs*, 134 U. S. 316, 321: "The well-being of every community requires that the title of real estate therein shall be secure, and that there be *convenient and certain methods of determining any unsettled questions respecting it.* The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the state; and as this duty is one of the state the manner of discharging it must be determined by the state, and *no proceeding which it provides can be declared invalid unless in conflict with some special inhibitions of the Constitution or against natural justice.*"

United States v. *Fox*, 94 U. S. 315, 320.
Langdon v. *Sherwood*, 124 U. S. 74, 81.
Arndt v. *Griggs*, 134 U. S. 316.
Lynch v. *Murphy*, 161 U. S. 247.
Hamilton v. *Brown*, 161 U. S. 256, 275.
Wehrman v. *Conklin*, 155 U. S. 314, 331.

The present act was passed in the exercise of this power of the Legislature relating to land within its limits, and hence subject to its jurisdiction. The proceedings which the act authorizes end in a decree determining, declaring and ordering the registration of the title to land, and the act provides new rules regulating the tenure, method of transfer, descent and disposition by will of registered land.

The right of the state to deal with the subject-matter involved being clear, it remains to consider whether the mode of proceeding in the initial registration of titles under this act is "in conflict with some special inhibitions of the Constitution or against natural justice;" or, in other words, is "due process of law."

II.

Due Process of Law.

"A perfectly satisfactory definition of due process may perhaps not be easily stated," Mr. Justice Brewer in *Brown* v. *New Jersey*, 175 U. S. 172, 176.

In *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 563, the court said, speaking through Mr. Justice McKenna: "What it is for a state to deprive a person of life, liberty or property without due process of law" is not much nearer to precise definition to-day [1899] than it was said to be by Mr. Justice Miller in *Davidson* v. *New Orleans*, 96 U. S. 97. The difficulty of definition is inherent (*Freeland* v. *Williams*, 131 U. S. 405, 418). Whether process of law is *due* process depends upon so many considerations that it is impossible to make a definition that will serve as a test for all cases. Attempts at definition when made even by this court have had to be qualified. The method applied in *Murray's Lessee* v. *Hoboken*, 18 How. 272, 276–7 (1855), of determining the question of due process by reference to and comparison with settled usages and modes of proceeding existing in England and brought to this country by our ancestors, has not been held to be the only method to be followed.

Hurtado v. *California*, 110 U. S. 516.
Maxwell v. *Dow*, 176 U. S. 581.

Settled usages and modes of procedure may be changed (*Hallinger* v. *Davis*, 146 U. S. 314, 321).

"Any legal proceeding enforced by public authority, whether sanctioned by age and custom or *newly devised* in the discretion of the legislative power, in furtherance of the general public good, which regards these principles of liberty and justice, must be held to be due process of law." Mr. Justice Matthews in *Hurtado* v. *California*, 110 U. S. 516, 537.

This court, speaking through Mr. Justice Brown in *Holden* v. *Hardy*, 169 U. S. 366, in an exhaustive opinion reviewing all the cases bearing on due process of law, points

out that it has not "failed to recognize the fact that the law is, to a certain extent, a progressive science;" that in some states methods of procedure formerly thought to be essential for the protection of life, liberty and property have been changed; that, for example, special pleading, ancient tenures of real estate and grand juries have been abolished, and indictments have been simplified; that "while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation;" and that the Constitution of the United States "should not be so construed as to deprive the states of the power to amend their laws so as to make them conform to the wishes of the citizens, as they may deem best for the public welfare, without bringing them into conflict with the supreme law of the land."

An examination of the decisions of this court shows that, in discussing the meaning of the phrase "due process of law," the court has repeatedly referred to the purpose for which the equivalent and parent phrase "the law of the land" was inserted in Magna Charta as the best indication of its true meaning. That purpose has been frequently declared to have been to secure the subject against the *arbitrary action* of the king, and to place him under the protection of the law.

Missouri Pacific R.R. Co. v. *Humes*, 115 U. S. 512.
Dent v. *West Virginia*, 129 U. S. 114.
Hurtado v. *California*, 110 U. S. 516.
Davidson v. *New Orleans*, 96 U. S. 97.

In England this phrase in Magna Charta was not intended as a limitation on the power of Parliament, but in this country the equivalent phrase "due process of law" is a restraint on all the powers of government, legislative as well as executive and judicial.

Murray's Lessee v. *Hoboken*, 18 How. 272.

It is repeatedly asserted, in the decisions of this court, that the phrase "due process of law" in the Fifth and Fourteenth Amendments is intended to secure the citizen

in his person and property against the *arbitrary exercise of the powers of government unrestrained by the immutable principles of natural justice.* And this is probably as complete a definition of the phrase as can be given.

Holden v. *Hardy*, 169 U. S. 366.
Davidson v. *New Orleans*, 96 U. S. 97, 107.
Bank of Columbia v. *Okely*, 4 Wheat. 235.
Caldwell v. *Texas*, 137 U. S. 692, 697.
Hodgson v. *Vermont*, 168 U. S. 262.
Fong Yue Ting v. *United States*, 149 U. S. 698, 763.
Jones v. *Brim*, 165 U. S. 180, 182.
Hurtado v. *California*, 110 U. S. 516.
Dent v. *West Virginia*, 129 U. S. 114.
Missouri Pacific R.R. Co. v. *Humes*, 115 U. S. 512.
Leeper v. *Texas*, 139 U. S. 462, 468.

The words "due process of law" do not guarantee any "particular *forms of procedure*, but the very *substance* of individual rights to life, liberty and property."

Hurtado v. *California*, 110 U. S. 516.
Louisville & Nashville R.R. v. *Schmidt*, 177 U. S. 230, 236.
Kennard v. *Louisiana*, 92 U. S. 480.

In every case, therefore, when it has become necessary to consider whether a statute provides "due process of law," the court has considered the subject-matter dealt with, the purpose for which the statute was passed, and all other matters bearing on the question, whether the statute was arbitrary, oppressive or partial in its application. The following are examples of such cases: —

Missouri Pacific R.R. Co. v. *Nebraska*, 164 U. S. 403.
Chicago, etc., R.R. v. *Minnesota*, 134 U. S. 418.
King v. *Mullins*, 171 U. S. 404.
Missouri Pacific R.R. Co. v. *Humes*, 115 U. S. 512.

Lawton v. *Steele*, 152 U. S. 133.
Wilson v. *North Carolina*, 169 U. S. 586.
Holden v. *Hardy*, 169 U. S. 366.
Turner v. *New York*, 168 U. S. 90.
Kennard v. *Louisiana*, 92 U. S. 480.
Gulf, etc., R.R. v. *Ellis*, 165 U. S. 150.

Proceedings under Tax Statutes.

Statutes passed in the exercise of the taxing power are valid if they provide for notice by publication to the owner of property taxed, and give him a right to be heard at some stage of the proceeding upon the question of the fairness of the tax assessed. *Ex necessitate* the proceedings are less formal than in judicial proceedings.

Spencer v. *Merchant*, 125 U. S. 345.
Walston v. *Nevin*, 128 U. S. 578.
Palmer v. *McMahon*, 133 U. S. 660.
McMillen v. *Anderson*, 95 U. S. 37.
Lent v. *Tillson*, 140 U. S. 316, 327.
Hagar v. *Reclamation District*, 111 U. S. 701.
Bauman v. *Ross*, 167 U. S. 548, 590.
Paulsen v. *Portland*, 149 U. S. 30–40.
Fallbrook Irrigation District v. *Bradley*, 164 U. S. 112.

Proceedings under the Power of Eminent Domain.

A statute authorized the appointment of commissioners to take land for a railroad and assess damages therefor. Before acting, the commissioners were to give notice by publication. The commissioners gave notice by publication addressed generally to all persons owning land on the line of the railroad, "as the same is now or may be located, through section 23, township 11, range 25, in the county of Wyandotte and state of Kansas." The notice stated that the commissioners would on a certain day proceed to locate the road through that section and *assess damages for land taken.*

The court held that the statute was constitutional, and that the proceedings constituted "due process of law," the statute *going upon the necessity of the case, and upon the reasonable*

presumption that, since all the parties could not be served personally with notice, the publication which was designed to meet the eyes of everybody was to stand for such notice.

Huling v. *Kaw Valley Ry. Co.*, 130 U. S. 559.

Statutes passed in the Exercise of the Police Power.

In considering the validity of statutes passed in the exercise of the police power, the inquiry always is whether the provisions of the statute are designed to meet some reasonable public purpose in a reasonable manner. Statutes have been sustained which direct the abolition of grade crossings at the expense of railroad companies (*N. Y. & N. E. R.R. Co.* v. *Bristol*, 151 U. S. 556); making railroads liable in double damages for losses occasioned through failure to erect fences (*Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 512); depriving railway companies of the defence of contributory negligence in respect to injuries received by employees and of the right to contract for exemption from liability for negligence (*Missouri Ry. Co.* v. *Mackey*, 127 U. S. 205, 209); requiring railroad employees to be examined as to their eyes, and the company to pay for the expenses of the examination (*Nashville, etc., Ry.* v. *Alabama*, 128 U. S. 96); making railroad companies responsible in damages for all property set on fire by their engines, whether directly or indirectly, and irrespective of negligence (*St. Louis, etc., Ry.* v. *Mathews*, 165 U. S. 1, 5); limiting the hours of employment in occupations injurious to health (*Holden* v. *Hardy*, 169 U. S. 366).

Where legislation of this character, however, is based upon classifications which are arbitrary, unreasonable and oppressive it is not due process.

Gulf, etc., Ry. v. *Ellis*, 165 U. S. 150.

Statutes providing Methods of Legal Procedure.

In matters of procedure, as in other cases, due process law depends upon the nature of the proceeding as well as of the object of the law. It is only when, under the guise of legal procedure, the fundamental rights of the individual are invaded, that relief can be properly sought under the

Fourteenth Amendment. That procedure constitutes due process of law which is *reasonably suitable to the nature of the case.*

Kennard v. *Louisiana*, 92 U. S. 480.
Hagar v. *Reclamation District*, 111 U. S. 701.
Ex parte Wall, 107 U. S. 265, 289.

A striking illustration of the general proposition that due process depends upon the subject-matter of a statute is

Lawton v. *Steele*, 152 U. S. 133.

In that case a state statute was held valid that forbade fishing other than by hook and line, and authorized the *summary destruction by any person* of any net, pound or other means for taking fish used in violation of the act. It was said that the state had the power to protect the fisheries, and might authorize judicial proceedings for condemnation and forfeiture, and where the property was of little value and its use for illegal purposes clear the legislature might subject it to summary abatement; and that in drawing the line between cases where property might be summarily destroyed and where it must be judicially condemned, value was a consideration, as also was the comparative cost of judicially condemning such property and the value of the property itself.

So the test of the validity of a limitation statute is whether, taking all the circumstances into consideration, the statute allows a reasonable time for the commencement of suits.

Wheeler v. *Jackson*, 137 U. S. 245, 258.
Barrett v. *Holmes*, 102 U. S. 651, 658.
Campbell v. *Holt*, 115 U. S. 620.
Turner v. *New York*, 168 U. S. 90.

"The Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these pur-

poses *gives reasonable notice* and *affords fair opportunity* *be heard* before the issues are decided."

White, J., in Iowa Central R.R. v. *Iowa*, 1
U. S. 389–393.
Hurtado v. *California*, 110 U. S. 516.

From this examination of the authorities may be deduc the general principle that a state statute providing for method of procedure for determining, establishing and d claring the title to land within the state, and for the entry a decree affecting such land by changing the mode of i acquisition and transfer, is valid as constituting due proce of law so far as notice is concerned, if, taking into conside ation the subject-matter, the purpose of the statute, and th mode of proceeding, the statute provides for reasonab notice and affords fair opportunity to be heard. What " reasonable notice" and what is a "fair opportunity" wi be discussed hereafter.

III.

The provisions of the act relating to initial registratio are here set forth in detail.

Application for registration of title may be made to th Court of Land Registration by the person or persons claim ing to own the land in fee or to have the power of appointin or disposing of the land in fee (§ 19). The application i to be in writing, signed and sworn to by the applicant or b his authorized attorney. It must contain an accurate de scription of the land, must state whether the applicant i married, and if married give the name of the wife or hus band; if unmarried, whether he or she has been married and if so when and how the marriage relation terminated (i by divorce when, where and by what court the divorce wa granted). It must state the name in full and the address o the applicant, and also the names and addresses of the owners and occupants of adjoining land, so far as known, and if not known it must state what search has been made t find them. It must set forth clearly all other outstanding estates or interests known to the petitioner and all claims of interest set up, whether admitted or denied (statute so con-

strued by the state court, Record p. 33), and the name, place of residence and post-office address of the occupant, if there is one, and the nature of his occupancy (§ 21). The court may by rule require additional facts to be stated (§ 28). Making a false statement in the application is declared to be perjury and is punishable as such (§ 112).

The applicant is to file with his application a plan of the land and all original muniments of title within his control (§ 26).

Upon the filing of the application a memorandum thereof containing a copy of the description of the land concerned is to be filed at once in the registry of deeds, which memorandum is to be recorded and indexed with the records of deeds (§ 20). The case is immediately referred to one of the official examiners (attorneys at law appointed by the judge, § 12), who searches the records and investigates all facts stated in the application or otherwise brought to his notice and reports his opinion of the title (§ 30). If the examiner is of opinion that the applicant has a good title as alleged, or if the applicant after an adverse report by the examiner elects to proceed, the recorder is required immediately upon the filing of the examiner's opinion, or the applicant's election, to publish a notice by order of the court in some newspaper published in the district where any portion of the land lies. This notice is to be addressed by name to all persons known to have any adverse interest or claim, whether admitted or denied, and to the adjoining owners and occupants so far as known, and "to all whom it may concern." It is to contain a description of the land, the name of the applicant and the time and place of the hearing (§ 31). The return day of the notice is to be not less than twenty nor more than sixty days from the date of issue (§ 32). Within seven days after publication the court is to cause a copy of the notice to be mailed to every person named in the notice whose address is known, and also a duly attested copy to be posted by a sheriff or deputy sheriff in a conspicuous place on each parcel of land included in the application fourteen days at least before the return day (§ 32). The court, so far as it deems it possible, is to require proof of *actual notice to all adjoining owners and to all persons who*

appear to have any interest in or claim to the land, and notice to such persons by mail must be by registered mail (§ 32, as amended by St. 1900, c. 354, § 5). The court may also cause other or further notice to be given in such manner and to such persons as it may deem proper (§ 32), and it may appoint a guardian *ad litem* for minors, and for all persons not in being, unascertained, unknown or out of the Commonwealth who may have an interest (§ 33, as amended by St. 1899, c. 131, § 6).

Any person, whether named in the notice or not, may appear and object to the application (§ 34). If no person appears and objects on or before the return day, or within such further time as may be allowed by the court, the court may order a general default, which concludes all the world, and may make a decree thereon (§ 35). Before decree the court may order a survey to determine boundaries and may order durable bounds to be set (§ 36).

If an appearance and objection is entered a default is first to be taken against all who do not appear, and the case is then heard on the objection made either by the court or by reference to a master (§ 36). If the court finds that the applicant has not title proper for registration, the application is dismissed (§ 37); but instead of dismissing an application the court may allow proper parties to be joined or substituted and may make a decree declaring the title to be in them (§ 23). If it finds that the applicant has title proper for registration it enters a decree of confirmation and registration (§ 38), which describes the land as finally determined and sets forth the estate of the owner and all particular estates, encumbrances and interests to which the land is subject (§ 40).

The decree binds the land and quiets the title subject only to the exception of certain enumerated rights (§ 39), and is conclusive upon and against all persons, including the Commonwealth, whether mentioned by name in the application, notice or citation, or included in the general description "to all whom it may concern". Such decree is not to be opened by reason of the absence, infancy or other disability of any person affected thereby, nor by any proceeding at law or in equity for reversing judgments or decrees; subject,

however, to the right of any person deprived of land or of any estate or interest therein by a decree of registration obtained by fraud to file a petition for review within one year after the entry of the decree, provided no innocent purchaser for value has acquired an interest (§ 38).

A right of appeal from the decree of registration is given, the appeal to be taken within thirty days of the date of the decree (§ 14).

IV.

The plaintiff in error argues that the provisions for initial registration are invalid because

(1) Persons named in the notice and residents of the state may not constitutionally be barred by such proceedings unless they are served with process in the way usual in ordinary suits *in personam;* and

(2) Persons unknown and not named, except generally by the words "to all whom it may concern," may not constitutionally be barred by such proceedings at all.

The objections may best be considered together.

There are two answers to these objections either one of which, it is contended, is sufficient to dispose of them. The first answer is that the proceedings for initial registration are strictly proceedings *in rem*, and the notice prescribed is sufficient, publication of notice alone being all that is required in proceedings *in rem*. This is the answer which Mr. Chief Justice Holmes makes. But it is apparent that it is unnecessary to the decision of this case to classify these proceedings at all, because the act provides for other means of notice besides publication. The four other judges (excepting the two dissenting judges) preferred, therefore, to answer the objections raised by *assuming* that "in cases in which, under the constitutional requirements of due process of law, it heretofore has been necessary to give to parties interested actual notice of the pending proceeding by personal service or its equivalent in order to render a valid judgment against them, it is not in the power of the Legislature, by changing the form of the proceeding from an action *in personam* to a suit *in rem*, to avoid the necessity of giving such a notice," and by *assuming* that "under this statute personal rights in

property are so involved and may be so affected that effectual notice and an opportunity to be heard should be given to all claimants who are known or who by reasonable effort can be ascertained" (Record, p. 37), and by deciding that this act makes provision for giving such effectual notice and opportunity to be heard.

In considering the first answer to these objections it is well to bear in mind what the precise inquiry is. It cannot be denied that the intent of the Legislature to provide that the proceedings for initial registration should be treated and considered as proceedings *in rem*, is expressly declared and is clear. "The proceedings upon such application shall be proceedings *in rem* against the land, and the decree shall operate directly on the land and vest and establish title thereto" (§ 2, as amended; see also §§ 35, 38). The real question, therefore, in this connection is: Does the Fourteenth Amendment prevent a state from treating a proceeding for determining and declaring the title to land within its limits as a proceeding *in rem* and from providing for the form of notice characteristic of such proceedings? (See *Arndt* v. *Griggs*, 134 U. S. 316, 319, 320.)

Mr. Justice Loring argues that the Federal Constitution does have this effect. His argument briefly stated is that there have been only certain proceedings *in rem* known to the common and statute law; that no such proceeding was ever known to that law the purpose of which was merely to enforce a claim of title to property; that the Legislature cannot create any new proceeding *in rem* except one which has the characteristics said by him to be common to all proceedings *in rem;* and these characteristics he defines by describing a proceeding *in rem* as one in which property alone is proceeded against as a defendant responsible for certain claims.

The test of a proceeding *in rem* he states as follows: "Is it a proceeding to enforce a liability for which the *res* is liable, irrespective of who owns it, — such a liability that the *res* can be properly impleaded as the respondent who is liable? If it is, it is a proceeding *in rem*, otherwise not, and the Legislature cannot make it a proceeding *in rem*." (Record, p. 52.)

But what reasons does he give for saying that the Legislature is bound by this supposed constitutional limitation? What fundamental principles of natural justice justify a proceeding *in rem* to enforce a claim for tort or for wages against all interests in a vessel, but forbid a claim of title being enforced in the same way? Why do such principles allow a non-resident's land to be sold on a judgment obtained in a suit of which he has notice only by publication (which may not be actual notice at all); and allow also a non-resident's claim of title to be barred in the same way (*Arndt* v. *Griggs*, *supra*), but forbid a suit to establish a claim of title being treated as a proceeding *in rem*, except as to non-residents? His reasons are not expressly given but are apparently to be implied from his definition of the essence of a proceeding *in rem*.

The learned judge says, in effect, the fundamental principles of natural justice are not violated because in a true proceeding *in rem* the defendant is not a person but property which is properly held liable for certain claims, and the remarks of Mr. Justice Field in *Freeman* v. *Alderson*, 119 U. S. 185, 187, are cited to the effect that a suit *in rem* is a proceeding against property alone "treated as responsible" for certain claims.

But that this is a mere fiction is apparent from the words cited from the opinion in *Freeman* v. *Alderson*. The property is merely "treated" as responsible. It is not and cannot be *natura rerum* "responsible" for anything; and an argument based on a pure fiction can have no weight where realities and fundamental rights are concerned. When such fundamental rights have been in danger of denial if the fiction were treated as a reality, this court has gone behind the fiction and regarded a proceeding *in rem* as in substance against persons, and has decided accordingly.

In *Boyd* v. *United States*, 116 U. S. 616, a statute was examined which authorized the court in revenue cases to compel a defendant or claimant to produce any paper tending to prove the government's case. It was held repugnant to the Fifth Amendment, as applied to suits *in rem*, to establish a forfeiture of goods. In a prior decision by a United States Circuit Court judge (*United States* v. *Mason*, 6 Bis-

sell, 350) the statute had been held constitutional on the ground that the proceeding being *in rem* was not against persons but against property, and that therefore the act did not require the claimants to furnish evidence against *themselves* contrary to the Fifth Amendment. The court, however, refused to assent to this proposition, declaring that the proceeding was in effect a proceeding against the owner, and said (p. 637): "In the words of a great judge, 'Goods as goods cannot offend, forfeit, unload, pay duties, or the like, but men whose goods they are'" (Vaughan, C.J., in *Sheppard* v. *Gosnold*, Vaugh. 159, 172); and again (p. 638): "although the owner of goods sought to be forfeited by a proceeding *in rem* is not the nominal party, he is nevertheless the substantial party to the suit." To *treat* property as alone responsible for claims, and dispose of it by a judicial proceeding without taking any steps to notify the owners whose rights are affected, may work a denial of fundamental rights quite as completely as if the owners were treated as parties.

Nor does the distinction taken by the learned judge that the only claims enforceable by proceedings *in rem* are those for which the *res may be properly treated as liable* tend to throw much light on the main question. Why is a claim for wages, or for a tort committed by the master of a ship, a claim for which you may *properly* treat the ship as a defendant? What are the criteria for judging the propriety of applying the fiction to such a case? Does the Constitution (as we should imply that the learned judge thought) permit the title to land to be cleared by enforcing a mechanic's lien against all interests in it by strict proceedings *in rem* merely because the land may be "properly impleaded as the respondent who is liable"? If so, why should not a claim of ownership in fee be enforceable in the same way?

Is seizure of the *res* to be considered as essential to a proceeding *in rem?* The object of seizure in such a proceeding is to keep the property within the control of the court so that its judgment may be enforced. If the judgment may be enforced without seizure, it is unnecessary.

Roller v. *Holly*, 176 U. S. 398, 406.

And if the property is immovable, seizure is unnecessary and superfluous.

23639

As a means of notice, seizure may be wholly inadequate, for it may be purely formal, as, for instance, in the case of an attachment of real estate which is made by depositing in the registry of deeds a copy of the writ (Pub. Sts., c. 161, §§ 61–66), or the seizure of a ship in a libel *in rem* in admiralty, which is effected by affixing a copy of the warrant to the mast of the ship. It was not essential in either proceeding that possession should be retained by the officer making the seizure (2 Browne's Civil & Admiralty Law, pp. 398–9).

Whether or not actual seizure of property other than personal is essential, it is certain that jurisdiction in a proceeding *in rem* may be acquired by *acts of equivalent import*. As this court said, through Mr. Justice Miller in *Cooper* v. *Reynolds*, 10 Wall. 308, 317: "While the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate which, being incapable of removal, and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court." The immediate filing of the notice of *lis pendens* in the registry of deeds (§ 20), and the posting of a copy of the notice on the land by the sheriff or his deputy, is an "act of equivalent import" within the meaning of the opinion in the above case.

What, then, is the true justification for holding that the state has the power to declare that proceedings like those provided for by this statute may be treated as *in rem*? It is submitted that it lies in the reasonable requirements of justice.

In suits against non-residents served with notice only by publication, property within the jurisdiction may be held responsible for the claim sued on. In suits against a non-resident, to declare title to land within the jurisdiction, notice by publication is sufficient (*Arndt* v. *Griggs*, 134 U. S.

316). In suits to foreclose a mortgage or enforce a mechanic's lien upon land in the state, the same is true (*Roller* v. *Holly*, 176 U. S. 398). In a libel *in rem* in admiralty a judgment may be entered affecting the property within the control of the court, without notice other than by publication. The essential element that is common to all these actions is not that of seizure or personification of the property as a defendant, but it is this: that the property is subject to the control of the court and that the reasonable requirements of justice demand that it should be affected or disposed of without other regard to the rights of the persons interested than that notice of the proceedings in some reasonable form should be sent to them. In attachment proceedings against non-residents justice demands it because it is fair that their property within the state should be held to pay their just debts. In suits to declare title or to enforce a mortgage justice demands it because otherwise a state would be powerless to settle title to or enforce a lien upon its own land. This is precisely the ground upon which the statutes allowing service by publication were held valid in *Arndt* v. *Griggs*, *Hamilton* v. *Brown*, and *Short* v. *Caldwell*, stated below. And it is the ground upon which rest those numerous statutes printed in the appendix providing for notice to unknown persons by publication.

Now, it would be difficult to think of a judicial proceeding to which the requirements of justice more plainly demanded the application of the rules relating to proceedings *in rem* than the proceedings for initial registration under this act. The land, the title to which is sought to be declared, is absolutely within the control of the state. Nay, even, the land *is* the state. Absolute certainty of title is of the utmost importance to the public welfare, so much so, indeed, that it has even been proposed that merely to clear titles the state might take all the land within its limits by right of eminent domain. Absolute certainty against unknown claims, as against claims of non-residents, can be secured only by treating the proceeding as a proceeding *in rem*. The necessity is as great in the case of unknown claimants as in the case of non-resident claimants or of persons unascertained or not

in being. And the fundamental requirements of justice are equal in all three cases.

It is said, however, by Mr. Justice Loring, that this proceeding is not an action *in rem* like certain probate or bankruptcy proceedings, the object of which is to find an owner for property *in gremio legis*, but is merely an action to enforce a personal right in property. We say, however, that this *is*, simply and solely, an action to find and determine the owner for property, property which is *in gremio legis*, just as much as the estate of a bankrupt or the estate of a dead man. If the state, through its probate court, can dispose of the real estate of a dead man and determine its ownership, because it is necessary as a public matter that the ownership of real estate should be judicially determined and fixed, why cannot the state, for the same reason and to the same end, do the same thing through its Court of Land Registration as to the real estate of a living person? It is the *real estate* in which the sovereign power is interested, not the rights, past or present, of any individual, alive or dead. Is there any reason why the proceeding for initial registration, therefore, should not be treated as a proceeding *in rem*, or in the nature of a proceeding *in rem*, or that the state should be held to be precluded from treating it as such a proceeding, and making such provision for notice as is reasonable under the circumstances? We submit that there is not.

Mr. Justice Loring says (Record, p. 53) that if these proceedings are upheld as proceedings *in rem*, "it is within the constitutional power of the Legislature to provide that any property within the territorial limits of the Commonwealth, real or personal, corporeal or incorporeal, may be recovered, or any title therein or lien thereto established, in a proceeding in which no defendant need be named and no notice need be given except notice by publication." It is respectfully submitted, however, that this does not necessarily follow if the view above expressed is correct. The ultimate test of the power of the state in this respect is not alone whether the property concerned is within its limits, but whether, in addition, the reasonable requirements of justice demand that

the proceeding should be by a proceeding *in rem*, with its accompanying characteristics as to notice.

It may be said generally of the dissenting opinion that it is founded wholly upon the proposition that the Land Registration Act is essentially a process to afford a remedy to an individual land-owner whose title is clouded, by which he may, upon instituting a suit, obtain a judgment, either against known and definite defendants or against all the world, as "parties respondent," forever barring and enjoining them personally from enforcing their rights or claims against him and his property.

But upon this point the opinion entirely overlooks the real purpose, true character of the machinery and the practical result of the Land Registration Act.

The original Torrens system was an administrative system for the regulation of land records and the simplification of land transfer, drawn by an administrative officer, not a lawyer, for the benefit of the body politic in its dealings with real estate, and having nothing to do either with flaws in title or actions either at law or in equity, by any individual or against any individual, for the purpose of obtaining any sort of a judgment whatever.

In Massachusetts the demand for this system and the need of this system were not to enlarge the number or nature of the proceedings, either at law or in equity, by which any individual citizen or citizens sought a remedy through the courts against any other citizens, individually or collectively. Neither was it nor is it (except in a very incidental way) to repair defects and flaws in title. It was the delay and the expense of our present methods of land transfer, and the complicated and expensive and unsafe method of keeping our public land records, which led to the introduction of the Land Registration Act now under consideration. The real purpose is to enable the record titles of real estate in this Commonwealth to be put into such shape and to be kept in such a manner that they can become marketable assets of the owners, readily dealt with, and with the public records kept in a safe and proper form.

It is true the machinery is started by an individual owner, but his petition is not that somebody or anybody shall be enjoined or debarred by any order of the court. Neither

is it that he shall have a judgment against somebody or anybody or everybody. It is merely that the land shall be brought within the operation of the Registration Act as an administrative measure, instead of remaining within the operation of the old registry acts, and that his title thereto (which is simply the equivalent to *the* title thereto) shall be determined ("registered and confirmed," § 21) after a judicial investigation by disinterested officials of the court.

The Land Registration Act in Massachusetts, like that in England and throughout her colonies, is therefore essentially an administrative measure. It really provides for a judicial investigation in aid of a legislative regulation. It is as much a matter of public administration as is taxation, the police power or the exercise of the right of eminent domain, and the same test as to "due process of law" should apply to it as to them.

Whenever by the laws of a state "a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law."

Davidson v. *New Orleans*, 96 U. S. 97.

V.

The second answer to the objections to the statute, and that which a majority of the Supreme Judicial Court of Massachusetts have considered decisive, is that the statute provides for such reasonable notice as to render the provisions for initial registration constitutional.

First, as to known persons named in the notice and residing outside of Massachusetts.

It will doubtless not be denied that publication of notice, together with notice by registered mail, is sufficient as to them. It has been definitely settled by decisions of this court that a state may provide by statute for adjudicating

title to real estate within its limits by a proceeding of which non-residents interested are notified only by *publication*.

Arndt v. *Griggs*, 134 U. S. 316.

The doctrine of this case has been re-affirmed in

Hamilton v. *Brown*, 161 U. S. 256.
Lynch v. *Murphy*, 161 U. S. 247.
Wehrman v. *Conklin*, 155 U. S. 314, 321.

See also

Single v. *Scott Paper Mfg. Co.*, 55 Fed. Rep. 553.
Morris v. *Graham*, 51 Fed. Rep. 53.
United States v. *Southern Pacific R.R.*, 63 Fed. Rep. 481.
Meyer v. *Kuhn*, 65 Fed. Rep. 705.

Second, as to known persons named in the notice and residing in Massachusetts.

The statute provides that notice to them should be given by registered mail. Besides this, notice is to be posted on the land and published, and what amounts to a notice of *lis pendens* is to be filed in the registry of deeds. By St. 1900, c. 354, § 5 (amending § 32 of the original act), proof of actual notice to all adjoining owners and to all persons interested in or having a claim to the land is to be required by the court so far as it deems it possible. It is to be noted that the provisions as to registered mail and proof of actual notice were made by amendments to the original statute passed after the decision of the state court in this case; but this discussion is based on the assumption that the statute will be considered by this court as it stands with these amendments added.

It is said that service of process upon residents known and named, either personally or at the last and usual place of abode, is required by the Constitution, and that the provisions for service by registered mail are unconstitutional.

What is meant by "service of process?" "Process" originally referred to writs which the court issued either to compel attendance before it or to enforce its judgments.

But a rule to show cause or other notice issued by the court is as much process as a capias or subpœna to appear and answer. The distinctive feature is that it issues from the court.

Dwight v. *Merritt*, 18 Blatch. 306.
Kennard v. *Louisiana*, 92 U. S. 480.
Anderson's Dictionary of Law, 817.

"Personal service" is defined in Anderson's Dictionary of Law, 941, as "delivery of an original writ, notice or other paper, or a copy thereof with oral information as to the contents, to the person who is to be affected by the service." Delivery in hand, however, is not essential. Tendering a copy to the defendant, and on his refusal to accept it throwing it down in his presence after informing him of its contents, is personal service.

1 Archb. Practice (12th ed.), 199.

It cannot be denied that notice or citation issued by order of the Court of Land Registration and duly attested (§ 31) constitutes process within the meaning given above. The question then arises, does the Federal Constitution forbid the notice or process being served by registered mail?

There is no requirement of the Constitution that process should be served by an officer. It may be served by any indifferent person, as in England and New York.

Archbold Pr. (12th ed.), p. 199.
N. Y. Code, §§ 416, 434.

Why then should a state be bound down to service of process by messenger? Is such service a fundamental requirement of justice? When grand juries may be abolished in capital cases and petit juries in criminal and civil cases, is service of process by messenger sacred? (*Hurtado* v. *California*, 110 U. S. 516; *Walker* v. *Sauvinet*, 92 U. S. 90; *Maxwell* v. *Dow*, 176 U. S. 581.) When process was served by arresting the person, and when the jurisdiction of the court depended upon the actual presence of the defendant in court, personal service of process was essential; but since the passage of the various statutes allowing the

filing of "appearances" and authorizing judgment on default, a summons has become nothing but a notice.

It is true that in actions purely *in personam* the jurisdiction of the court is said to depend upon its control over the defendant and to be acquired by service of process.

Boswell's Lessee v. *Otis*, 9 How. 336, 348.

But in modern practice that is not the effect of the service of a writ. It does not bring the defendant within the control of the court at all. He is free to go where he likes. It is sufficient that he might have been brought before the court. The service is a mere notification. And there does not seem to be any reason why *as to residents* even a pure action *in personam* to establish a personal liability (such as *Pennoyer* v. *Neff*, 95 U. S. 714) might not constitutionally be possible by filing a petition and proving due notice sent through the mails. It was said in *Beard* v. *Beard*, 21 Ind. 321, 324, that the Legislature might authorize a personal judgment upon constructive notice alone.

See *Bickerdike* v. *Allen*, 157 Ill. 95.
Crawley v. *Isaacs*, 16 L. T. (N. S.) 529.
Reynolds v. *Fenton*, 3 C. B. 187.

As to non-residents, of course, the rule of *Pennoyer* v. *Neff*, 95 U. S. 714, would prevent the application of this method to such suits against them unless they were within the jurisdiction at the time the suit was begun.

But however this may be there is nothing in the Constitution that requires service of process by messenger in proceedings under this statute. Even if we assume that jurisdiction over persons can be acquired only by service of process by messenger, the assumption is immaterial The jurisdiction of the court under this statute does not depend upon the control it has over persons but over the *land within the state*. This proposition is illustrated by the following cases.

In *Boswell's Lessee* v. *Otis*, 9 How. 336, 348, was presented a case of a bill for a specific performance and an accounting, and in which was a decree for specific performance and accounting; and an adjudication that the amount due on

such accounting should operate as a judgment at law. Service was had by publication, the defendants being non-residents. The validity of a sale under such judgment was in question; the court held that portion of the decree and the sale made under it void; but with reference to jurisdiction in a case for specific performance alone, made these observations: "Jurisdiction is acquired in one of two modes: first, as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem* in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service or process, it is substantially of that character."

In the case of *Parker* v. *Overman*, 18 How. 137, 140, the question of the right of the state to determine the title to land within its limits was presented under an Arkansas statute, authorizing service by publication. While the decision on the merits was adverse, the court thus states the statute, the case and the law applicable to the proceedings under it: "It had its origin in the state court of Dallas County, Arkansas, sitting in chancery. It is a proceeding under a statute of Arkansas, prescribing a special remedy for the confirmation of sales of land by a sheriff or other public officer. Its object is to quiet the title. The purchaser at such sales is authorized to institute proceedings by a public notice in some newspaper, describing the land, stating the authority under which it was sold, and 'calling on all persons who can set up any right to the land so purchased, in consequence of any informality, or any irregularity or illegality connected with the sale, to show cause why the sale so made should not be confirmed.' In case no one appears to contest the regularity of the sale, the court is required to confirm it, on finding certain facts to exist. But if opposition be made, and it should appear that the sale was

made 'contrary to law,' it became the duty of the court to annul it. The judgment or decree in favor of the grantee in the deed operates 'as a complete bar against any and all persons who may thereafter claim such land, in consequence of any informality or illegality in the proceedings.' It is a very great evil in any community to have titles to land insecure and uncertain; and especially in new states, where its result is to retard the settlement and improvement of their vacant lands. Where such lands have been sold for taxes there is a cloud on the title of both claimants, which deters the settler from purchasing from either. A prudent man will not purchase a law-suit, or risk the loss of his money and labor upon a litigious title. The act now under consideration was intended to remedy this evil. It is in substance a bill of peace. The jurisdiction of the court over the controversy is founded on the presence of the property; and, like a proceeding *in rem*, it becomes conclusive against the absent claimant as well as the present contestant. As was said by the court in *Clark* v. *Smith*, 13 Pet. 195, 203, with regard to a similar law of Kentuckey: 'A state has an undoubted power to regulate and protect individual rights to her soil, and declare what shall form a cloud over titles; and, having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the Legislature, having its origin in the peculiar condition of the country. The state legislatures have no authority to prescribe forms and modes of proceeding to the courts of the United States; yet having created a right, and at the same time prescribed the remedy, to enforce it, if the remedy prescribed be substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as in the state court.' In the case before us the proceeding, though special in its form, is in its nature but the application of a well-known chancery remedy; it acts upon the land, and may be conclusive as to the title of a citizen of another state."

In the case of *Pennoyer* v. *Neff*, 95 U. S. 714, 727, 734, in which the question of jurisdiction in cases of service by publication was considered at length, the court, by Mr. Jus-

tice Field, thus stated the law: "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer *in all actions which are substantially proceedings in rem.* . . . It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors or instituted to partition real estate, foreclose a mortgage or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem* in the broader sense which we have mentioned."

Passing to a case later than that, *Huling* v. *Kaw Valley Railway*, 130 U. S. 559, 563, it was held that, in proceedings commenced under a statute for the condemnation of lands for railroad purposes, publication was sufficient notice to a non-resident. In the opinion, Mr. Justice Miller, speaking for the court, says: "Of course, the statute goes upon the presumption that, since all the parties cannot be served personally with such notice, the publication, which is designed to meet the eyes of everybody, is to stand for such notice. The publication itself is sufficient if it had been in the form of a personal service upon the party himself within the county. Nor have we any doubt that this form of warning owners of property to appear and defend their interest, where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action of the tribunals appointed by proper authority to determine those matters. The owner of real estate, who is a non-resident of the state within which the property lies, cannot evade the duties and obligations which the law imposes upon him in regard to such property by his absence from the

state. Because he cannot be reached by some process of the courts of the state, which, of course, have no efficacy beyond their own borders, he cannot, therefore, hold his property exempt from the liabilities, duties and obligations which the state has a right to impose upon such property; and in such cases, some substituted form of notice has always been held to be a sufficient warning to the owner of the proceedings which are being taken under the authority of the state to subject his property to those demands and obligations. Otherwise the burdens of taxation and the liability of such property to be taken under the power of eminent domain would be useless in regard to a very large amount of property in every state of the Union."

In *Mellen* v. *Moline Iron Works*, 131 U. S. 352, a bill in equity was brought to foreclose a lien under a trust deed of certain land and personal property in Illinois. The defence was that in a prior bill in equity it had been adjudged against the plaintiff's predecessor, one Hill, that the trust deed gave him no lien. In this former suit Hill was beyond the court's jurisdiction, but he was served with a copy of an order to appear. He did not appear and the bill was taken for confessed against him.

The order to appear was made under 18 Stat. at Large 472, c. 137, § 8, authorizing an order to appear against an absent defendant in any suit brought to enforce a lien upon or to remove a cloud from the title to real or personal property within the district where the suit was brought. Service was to be personal if practicable, otherwise by publication. If the defendant did not appear the court might proceed to a decree which, however, so far as he was concerned should affect only the property within the jurisdiction of the court.

The validity of this statute and the jurisdiction conferred by publication was sustained by this court.

In *Lynch* v. *Murphy*, 161 U. S. 247, a suit was brought to cancel a deed of land in Washington, D. C., made to the defendant. The defendant was served only by publication under R. S. § 787, and a decree was entered annulling the deed. The court held that the decree was not void, as it was not in conflict with the Constitution nor against natural justice.

23645

In *Short* v. *Caldwell*, 155 Mass. 57, a petition was brought under St. 1882, c. 237, to clear the record title to land in Massachusetts from the incumbrance of an undischarged mortgage. The act provides that: "When the record title of real estate is incumbered by an undischarged mortgage, and the mortgagor and those having his estate in the premises have been in uninterrupted possession of such real estate for twenty years after the expiration of the time limited in the mortgage for the full performance of the conditions thereof, he or they may apply to the Supreme Judicial Court by petition, setting forth the facts, and asking for a decree as hereinafter provided; and if, *after notice to all persons interested*, by publication or otherwise as the court may order, no evidence is offered of any payment on account of the debt secured by said mortgage within said twenty years, or of any other act within said time in recognition of its existence as a valid mortgage, the court may enter a decree setting forth such facts and its findings in relation thereto, which decree shall, within thirty days, be recorded in the proper registry of deeds, and thereafter no action shall be brought by any person to enforce a title under said mortgage." The respondents, who were non-residents, were the heirs of the alleged mortgagee. No service of the petition was made on them in Massachusetts. They appeared specially and objected to the jurisdiction of the court, because they were non-residents, relying upon the cases of *Macomber* v. *Jaffray*, 4 Gray, 82, *Leary* v. *Duff*, 137 Mass. 147, 150, and *Thompson* v. *Cowell*, 148 Mass. 552, which decided that the court had no jurisdiction under P. S., c. 176, to compel a non-resident claimant to land not personally served with process within the Commonwealth to bring an action to try his title. The court decided, however, that it had jurisdiction, saying, as to the two statutes (P. S., c. 176, and St. 1882, c. 237): —

"There is, however, an important difference between the two statutes. The P. S., c. 176, authorize a decree *in personam*, while St. 1882, c. 237, authorizes a decree *which simply operates on the estate*. The respondents are not called upon to do anything under it. The estate is here, and the

court may proceed to enter a decree which affects it, even though persons interested therein may be non-residents."

The most important of all these cases, however, is *Arndt* v. *Griggs*, 134 U. S. 316. It was there held that a statute was constitutional which provided for the adjudication of title to real estate within its limits as against non-resident defendants notified only by publication. It was contended in that case that in accordance with the doctrine of *Hart* v. *Sansom*, 110 U. S. 151, in a suit to quiet title no decree entered on service by publication alone was valid because an action to quiet title was a suit in equity; equity acted upon the person; and a person was not brought into court by service by publication alone. In dealing with this argument, the court said (p. 320): —

"While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity by virtue of its general powers and in the absence of statute might do, but it is what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts to determine the validity and extent of the claims of non-residents to such real estate? If a state has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. *It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto.* It cannot bring the person of a non-resident within its limits, — its process goes not out beyond its borders, — but it may determine the extent of his title to real estate within its limits; and for the purpose

of such determination may provide *any reasonable methods of imparting notice.*"

The distinction between statutory proceedings to declare title providing for notice by publication and bills to quiet title under the general equity jurisdiction is illustrated by the case of *Hart* v. *Sansom*, 110 U. S. 151. In that case the question was whether a former judgment of a Texas court had adjudicated the title to certain land between the parties. This judgment had been entered in a suit brought against the plaintiff by the defendant to remove an alleged cloud upon the land, and was based upon service by publication against the plaintiff, who was a citizen of New York. The court held that the former judgment was not an adjudication of title saying: "Generally, if not universally, equity jurisdiction is exercised *in personam* and not *in rem*, and depends upon the control of the court over the parties by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled or to execute a release to the plaintiff."

The distinction between the cases where a court is authorized to make a decree *operating directly upon the estate*, and those where the decree is effective only because it compels persons to act or to refrain from acting, is further recognized in

Sugg v. *Thornton*, 132 U. S. 524.
Dull v. *Blackman*, 169 U. S. 243.

It comes, then, to this. The proceedings for initial registration are not *in personam*, but since they end in a decree operating directly upon the land, the jurisdiction of the court to entertain them does not depend upon its control over persons but over the land. In such a case, therefore, following *Arndt* v. *Griggs*, the state may "provide any reasonable methods of imparting notice." If process may be

dispensed with altogether in the case of non-residents there can be no constitutional requirement that it must be served by messenger upon residents. The Federal Constitution must protect both residents and non-residents equally. If the right to be served with process by messenger is a fundamental right, it cannot be denied to non-residents and preserved to residents. But if service of process by messenger in these proceedings is a mere form which the state may dispense with as to non-residents, and is not based upon any fundamental principle at all, it may be dispensed with as to residents also. That service by registered mail, together with posting on the land, publishing and filing a notice of *lis pendens*, with proof of actual notice where the court deems it possible, is a reasonable method of imparting notice, and quite as adequate as service by messenger, cannot be denied (*Crawley* v. *Isaacs*, 16 L. T. (N. S.) 529). The statement by Mr. Justice Loring of the purpose for which the mail was originally devised (Record, p. 41), is not material. It is not the purpose for which either the mail service or service by deputy sheriff was originally devised, or how it originally worked, but what the conditions are to-day, that is important. The object of either method is to get notice to any person who ought to have notice. In 1644 or 1799 the best possible method of getting actual notice of a judicial proceeding to a man was to send the notice to the local sheriff to be served. To-day the very best possible method known to the law, to business, to social life, or to anything else, of actually reaching a man personally is a registered letter in the United States mail. Upon this point the Supreme Judicial Court of Massachusetts said (Record, p. 37): "When we are considering a proceeding of this kind it seems to us within the power of the Legislature to say that the mail as it is managed in Massachusetts is a sufficient messenger to convey the notice when other means of notifying the party, like publishing and posting, also are requisite."

It is to be observed that this was said of the statute before it was amended by requiring service by *registered* mail and proof of actual notice.

VI.

But it is said, however, by the two dissenting judges that the real question in the case does not depend upon whether service by mail is as likely to reach the respondent as service by messenger at the last and usual place of abode. The objection which they consider decisive is that under this statute a person named and interested may be conclusively barred by a decree although not personally served with process, nor notified in fact of the proceedings, and that the act therefore attempts to take away from him his constitutional right to be heard. The argument is (1) that every statute in Massachusetts authorizing a judgment on default based on any but personal service has given to the defendant not notified in fact a right to have the judgment vacated on writ of review; (2) that in Massachusetts and in all the other states, as is alleged, it has been the common law that a judgment based on other than personal service may be directly reviewed or collaterally attached by a defendant not notified in fact; (3) that these propositions are based upon the fundamental doctrine of the common law that no "judgment can be rendered affecting another's rights of person or property without giving to that other an opportunity to be heard"; and finally (4) that "in the light of the well-established general principle that no judgment can be rendered against a man until he has in fact had an opportunity to be heard, and the equally well-established application of that general principle, that a defendant has the right to be heard in review of a judgment rendered under a statute authorizing judgment against him to be entered in his absence, if he did not in fact have notice of the proceedings before the judgment was rendered, which principle has obtained since the first statute authorizing service of process at the last and usual place of abode of the defendant, and was a component part of that act, and which has been universally observed since then, the constitutional provisions in question must be construed to guarantee to every citizen the right to be heard before judgment against him becomes irrevocable; and if the judgment on default is based on any service of process other than personal service on the defend-

ant, provision must be made giving to the defendant who did not in fact have notice of the proceeding before judgment an opportunity afterwards to have it reversed or to attack it collaterally when it is set up against him" (Record, p. 45).

Taking up the argument in the order of the propositions named we first discuss the statement that every statute in Massachusetts authorizing a judgment on default based on any but personal service has given to the defendant not notified in fact a right to have the judgment vacated on writ of review (Record, p. 41).

Even if this statement is true the Supreme Judicial Court of Massachusetts has decided that the statute in question does not violate the requirement of the state Constitution that a person may not be deprived of his property save " by the law of the land " (Const. of Mass., Part 1, Art. XII.). So far as the learned judge's argument goes to the proposition that the right to a review under the circumstances mentioned is guaranteed by the state Constitution that question is foreclosed to this court by the decision of the state court, which has in effect decided that no such right is guaranteed which this statute takes away (*Brown* v. *New Jersey*, 175 U. S. 172). The argument derived from a consideration of these statutes is therefore purely local in its character and does not affect the question whether the right to review is guaranteed by the Fourteenth Amendment. No attempt is made to show that this right of review has always existed in every state of the Union.

But, with all respect, the statement is not accurate. The first Massachusetts statute to authorize a judgment on default on other than personal service gave the right of review to a defendant who was defaulted on service at his last and usual place of abode *if he was out of the jurisdiction* at the time of service. But it is expressly stated by the dissenting judge that it was not until 1820 (St. 1820, c. 53) that the right of review was extended to a defendant who was *within* the Commonwealth at the time of service, upon whom service was made at his last and usual place of abode and who was not actually notified. So that until 1820 such a person was conclusively bound by a judgment on such service although

he never had an opportunity to be heard. The writ of review was instituted by the Legislature in 1644, and from time to time extended, as occasion required, in order that no man should unjustly have a judgment rendered against him or his property when he neither knew, nor probably could know, anything about it. We submit that under the conditions of life as they exist to-day, an absent defendant is exactly as well protected by the provisions of the Land Registration Act providing for the notice of proceedings against him by posting on his land; by actual service of notice upon every one of the adjoining owners; by service of notice upon every one of the adjoining occupants; by publication in the newspapers; by actual service by registered mail upon every person whom the records on an independent judicial investigation disclose as having any possible right whatever; by the twenty days which must of necessity elapse during the proceedings, which, as a matter of practice, extend to fully six weeks; and by the *thirty days thereafter given all the world for an appeal*, as was an absent defendant by the provisions for a writ of review for one year under the conditions of life as they existed at the time when the several statutes providing for review were passed. There is nothing inherent in the law as to a right of review. It rests entirely upon statute. The Legislature created it as it thought the needs of the time demanded, and the same Legislature has, for the same reason, created this new process of law. Why should it not?

It is next asserted that in Massachusetts and in all the other states it has been held that a judgment based on other than personal service may be reviewed and vacated by a defendant not notified in fact, and is not binding, and that this follows from the fundamental doctrine of the common law that no judgment can be rendered affecting another's rights of person or property without giving to that other an opportunity to be heard.

It is not true, except in a very general sense, that it is a fundamental doctrine of the common law that no judgment can be rendered affecting another's rights of person or property without giving to that other an opportunity to be

heard. There were several proceedings known to the common law which resulted in a judgment binding upon a person who never had actual notice of them. The judgment on a writ of right after *mise* joined barred all strangers after the lapse of a year and a day (Booth, Real Actions, 101 in margin). A fine with proclamations had the same effect after the same time or by a later statute after five years (2 Bl. Com., 354; 2 Inst., 510, 518; St. 18 Ed. I., *modus levandi fines;* 34 Ed. III., c. 16; 4 and 5 Hen. VII., c. 24; 32 Hen. VIII., c. 36). By the process of foreign attachment in vogue in London and in other towns in England, as well as in many of the English colonies, goods belonging to a debtor within the jurisdiction in the hands of a third person, or money due from a third person to the debtor, might be attached, and unless the debtor appeared within a year and a day he was absolutely deprived of his property or the debts due him.

Douglass v. *Forrest*, 4 Bing. 686.

The common law proceeding of outlawry resulted in a judicial sentence by which a person forfeited his goods and chattels to the king, and became incapable of bringing suit for redress of grievances (3 Bl. Com., 284).

The inquest of office to establish an escheat, or to establish the fact that an alien held lands, which was a cause of forfeiture (3 Bl. 258–60), is another instance in point.

Neither is it true that by a rule of universal application a defendant not personally served with process nor notified in fact of a suit might attack the judgment obtained against him either directly or collaterally. It is admitted that "in some jurisdictions the judgment will not be vacated if the defendant failed to receive notice through a false return of the sheriff, or an unauthorized appearance was made by an attorney, unless a suit on the sheriff's bond or a suit against the attorney fails in fact to give him an adequate remedy" (see also *Finneran* v. *Leonard*, 7 Allen, 54). The case of *Sturgis* v. *Fay*, 16 Ind. 429, was a suit on a note, the writ in which was served by leaving at the defendant's last and usual place of abode. The defendant was defaulted, but at the next term moved to set the verdict aside, filing an affi-

davit that he was absent from the state at the time of service and had no notice of the suit until after judgment. The court held, however, that service at the defendant's residence was actual notice in law and refused to vacate the judgment.

But the cases which are most in point in this connection are those where a foreign judgment has been sued on in the English courts. In such cases it has been open to the defendant to prove anything in the proceedings against natural justice.

In *Crawley* v. *Isaacs*, 16 L. T. (N. S.) 529, a suit was brought in the Court of Exchequer on an Irish judgment for work done. The defence admitted the judgment, but said that the defendant was not served with process nor had notice of the suit. The replication was that the court acting by authority of statute directed the summons to be served upon the defendant by sending a copy by registered mail to him at London and ordered that this should be deemed to be good service unless within six days cause was shown to the contrary. The copy was sent as directed and judgment entered.

It was held that if the mode of procedure upon which a foreign judgment is entered departs from natural justice the judgment will not be enforced in England, but that the procedure of the Irish court was not contrary to natural justice.

The mere fact that the defendant was not served *with process* is not sufficient to warrant the court holding the judgment void as against natural justice. Issuing process is not essential to natural justice.

Reynolds v. *Fenton*, 3 C. B. 187.

In *Becquet* v. *McCarthy*, 2 B. & Ad. 951, the law of a British colony required that in a suit against an absent party the process should be served upon the king's attorney-general in the colony, but it was not expressly provided that the attorney-general should communicate with the absent party. It was held that such law was not so contrary to natural justice as to render void a judgment obtained against a party who had resided within the jurisdiction of the court at the time when the cause of action accrued, but had withdrawn himself before the proceedings were commenced. In this

case the contention was that it was contrary to the principles of natural justice that any one should be condemned unheard and in his absence.

In *Cowan* v. *Braidwood*, 1 Man. & Gr. 882, an action was brought upon a Scotch decree. The plea was that the defendant was not in the jurisdiction of the court when the suit was begun nor during its proceedings nor was he notified according to the practice of the court, nor did he know of the proceedings so that he could appear, nor did he appear; and that the decree was contrary to natural justice; but the plea was held insufficient.

Maule, J., said (p. 895): "The courts at Westminster, in sustaining decrees of foreign courts against absent persons, have decided that in their judgment a decree may not be contrary to natural justice, although made against a party who is absent, for absence alone is not sufficient to invalidate the proceedings."

In *Duflos* v. *Burlingham*, 34 L. T. (N. S.) 688, a plea to a declaration on a French judgment was that the defendant was not duly served with process, and that he had no notice of the action nor opportunity to defend himself. The plea was held insufficient.

In *Douglass* v. *Forrest*, 4 Bing. 696, Scotch judgments of *horning* against a Scotchman born were sued on. The judgments were obtained while the defendant was absent from Scotland and he had no notice of them, but according to the law of Scotland this was immaterial. Suit was brought in England on the judgments, and the defendant claimed that they were repugnant to the principles of justice.

Best, C.J., in delivering judgment said that "if these decrees are repugnant to the principles of universal justice this court ought not to give effect to them; but we think that these decrees are perfectly consistent with the principles of justice." He showed that under the process of foreign attachment in the city of London, and in the towns of England and in many of the colonies, if a debt was contracted and suit was brought and a return of *nihil* made, goods belonging to the debtor in the hands of a third person or money due from a third person to the debtor might be attached; and unless the debtor appeared within a year and

a day and disputed the debt he was forever deprived of his property or the debts due to him.

These cases are sufficient to show that the English courts when enforcing foreign judgments have never considered it an essential to natural justice that the defendant should have actual notice of the suit. The essential facts which must appear to render a foreign judgment suable are stated in *Rousillon* v. *Rousillon*, 14 Ch. D. 351, 371, and the presence or absence of notice is *not* essential if the other facts exist which the courts consider sufficient to warrant them in upholding the judgment.

See also *Buchanan* v. *Rucker*, 9 East, 192.
Schibsby v. *Westenholz*, L. R. 6 Q. B. 155.
Copin v. *Adamson*, L. R. 9 Ex. 345.

And in considering what the requirements of natural justice demand, the existence or non-existence of a right to review the judgment by direct proceedings is not alluded to as material.

VII.

The objection that the statute is unconstitutional because it attempts to bar unknown persons interested is not well founded.

There is nothing novel about the provisions of the Land Registration Act which authorize an adjudication of the title to real estate in Massachusetts conclusive against all the world, whether named in the citation by name or included under a general description. The act merely extends to the whole field of title principles and procedure which have hitherto covered only a portion of the field. The following citations have the effect to show that in Massachusetts, as well as in most of the other states, it has long been assumed and understood that the Legislature has power to pass statutes under which the rights of parties may be affected by judicial proceedings, notice of which is given by the publication of a citation in general terms, directed to "all persons interested," "unknown owners," etc.

Partition.

For at least one hundred and fifty years, in partition proceedings, Massachusetts statutes have provided for a final adjudication conclusive as against possible adverse claimants, whether *known or unknown*, who might have appeared and become parties to the proceedings.

Province Laws, 1742–3, c. 24, provides: —

Whereas the partition of lands is often delayed by reason that the parties concerned therein are very numerous, and live remote from each other, and sometimes in parts beyond the seas, *and are, as to some of them, unknown*, to the hindrance and retarding of improvement and settlements of lands in this province; for remedy whereof, —

Be it enacted by the Governor, Council and House of Representatives:

(Section 1.) That from and after the publication of this act, any person or persons interested with any others in any lot or grant of land, or other real estate, making application either by themselves or their lawful agents, attorneys or guardians, to the superior court of judicature, holden for and within the respective counties of this province, where such lot, grant or estate lies, the said court is hereby authorized and empowered to cause partition of such estate to be made, and the share or shares of the party or parties applying for the same, to be set off and divided from the rest, such petition to be made upon oath by five freeholders, or the major part of them, to be appointed by said court, and a return of such partition to be made to the clerk's office of said court; and the partition or division so made, being accepted by the said court, and there recorded, shall be valid and effectual *to all intents and purposes.*

Under this statute, if A brought a petition for partition of land and a notice issued generally to all persons interested and judgment of partition was entered, this judgment was conclusive as to the right of possession as against all persons, known or unknown, named or not named, and whether claiming to own the property in severalty or in common.

Cook v. *Allen*, 2 Mass. 462.

When the Revised Statutes were passed the effect of a judgment in partition was extended to cover the right of property as well as possession as between all parties and persons who might have appeared and answered the petition, and certain provisions were enacted meant to guard the rights of absent owners (R. S., c. 103, §§ 33–47).

Dascomb v. *Davis*, 5 Met. 335, 340.

But even with these provisions an unknown person was bound as to the method of partition and as to the size of the share to which he was entitled, or indeed whether he was entitled to any at all (§§ 39–42). (See *Foster* v. *Abbot*, 8 Met. 596, 599.) The partition no longer concluded the right of a person claiming to own in severalty (§ 38); and it was provided that "if any person who was a part owner with the petitioner, and for whom a share is left upon the partition, should be out of the state when the summons or notice to him is served and should not return in time to appear and answer to the suit, he may at any time within three years after the final judgment apply to the same court for a new partition of the premises" (R. S. c. 103, § 34). This right, however, did not apply to unknown persons not out of the state at the time of service.

The rule of *Cook* v. *Allen* was followed in Maine in

Baylies v. *Bussey*, 5 Greenl. 153, 159.
Foxcroft v. *Barnes*, 29 Maine, 128.
P. S., c. 178, §§ 9, 35, 63. St. 1882, c. 6.

Inquest of Office to establish Escheat.

In inquests of office to establish an escheat under St. 1791, c. 13, § 2, *general notice* had to be given of the claim of the Commonwealth, and any person was admitted as a party to the proceeding.

Wilbur v. *Tobey*, 16 Pick. 177, 180.
Compare *Hamilton* v. *Brown*, 161 U. S. 256.

Probate of Wills.

The judgment of a probate court allowing proof of a will and admitting it to probate is conclusive upon the rights of

all persons interested in both the real and personal estate disposed of, whether or not named in the citation.

Dublin v. *Chadbourn*, 16 Mass. 433.
Bonnemort v. *Gill*, 167 Mass. 338.

In the case of *Bonnemort* v. *Gill* (*supra*), in speaking of the kind of notice given upon a petition for the probate of a will the court said: "Under the rules of court in ordinary practice a general notice is given which is sufficient to justify final proceedings, even if in fact it fails to reach some of the persons interested. . . . The decree of the court admitting the will to probate is in the nature of a judgment *in rem*, which establishes the will against all the world. Any person interested may make himself a party to the proceedings by applying to the proper tribunal, and he is forever bound by the decree, whether he is in fact a party or not."

And a decree probating a will binds all the world, even if no notice at all is issued.

Crippen v. *Dexter*, 13 Gray, 330.

The following proceedings have the effect of a judgment *in rem* conclusive on all the world: —

Appointment of guardian is conclusive of the insanity of his ward.

White v. *Palmer*, 4 Mass. 147.
Leonard v. *Leonard*, 14 Pick. 280.

Allowance of final account of administrator is conclusive that he has fully administered.

Parcher v. *Bussell*, 11 Cush. 107.

Decree of distribution of an intestate estate is conclusive as to who are entitled to distribution.

Loring v. *Steineman*, 1 Met. 204.

Admiralty decree condemning vessel as prize is conclusive that the vessel was engaged in a breach of blockade.

Baxter v. *N. E. Marine Ins. Co.*, 6 Mass. 277.

Appointment of trustee or administrator by probate court is conclusive of the legality of the appointment.

Bassett v. *Crafts*, 129 Mass. 513.
McKim v. *Doane*, 137 Mass. 195.
White v. *Wetherbee*, 126 Mass. 450.

Decree of divorce is conclusive as to the status of the parties.

Burlen v. *Shannon*, 3 Gray, 387.

Decree of forfeiture in revenue case is conclusive of the liability of the goods to forfeiture.

Whitney v. *Walsh*, 1 Cush. 29.

For other Massachusetts cases, discussing proceedings *in rem* and effects of judgment in such proceedings, see

Brigham v. *Fayerweather*, 140 Mass. 411.
Waters v. *Stickney*, 12 Allen, 1.
Shores v. *Hooper*, 153 Mass. 228.
Salem v. *Eastern R.R.*, 98 Mass. 431.

In statutory proceedings under St. 1882, c. 237, to free the record title of real estate from an undischarged mortgage after twenty years' uninterrupted possession by the mortgagor, a decree bars all the world after notice "to all persons interested."

Short v. *Caldwell*, 155 Mass. 57.

Legislation in Other States.

The so-called Burnt Records Act of Illinois is much in point. Shortly after the great fire in Chicago, in 1871, in which the court house and the entire records of Cook County were destroyed, the Legislature, to remedy the evils arising from the destruction of the public records, passed this act (Laws of Illinois, 1871–2, p. 652. See also 2 Starr & Curtis, 1893). It provides that in case of such destruction the equity courts should have power to inquire into the condition of any title to or interest in any land in the county, and to make all such decrees as might be necessary to determine and establish

such title or interest, legal or equitable, *against all persons known or unknown*, and all liens existing on such lands, whether by statute, mortgage, deed of trust or otherwise. Any person claiming title to any lands in the county at the time of the destruction of its records, or any person claiming under such person, might file a petition in court praying for a decree establishing and confirming his said title. The petition must set out the interest claimed by the petitioner and how he derived title, the names of all persons owning or claiming any estate in fee in, or who should be in possession of, said lands, and also all persons to whom such lands had been conveyed, and the deed or deeds of such conveyance recorded in the office of recorder of deeds since the time of destruction of the records and prior to the filing of the petition, and their residences so far as they were known. All persons so named in the petition were to be made parties and notified of the suit by summons or publication in the same manner as required in chancery proceedings, *unknown owners or claimants to be brought in under the designation of* "all whom it may concern." Any person interested might oppose the petition, demur to or answer it, or file a cross petition if he desired. The decree in the proceeding was declared to be as to the title found forever binding and conclusive, except against minors and insane persons (who had two years after the removal of disabilities to sue out a writ of error), and persons in possession or to whom the lands had been conveyed and the deeds recorded since the destruction of the records and before the filing of the petition and not made parties defendant by name.

This statute has been pronounced constitutional and valid by the Supreme Court of Illinois and of the United States.

Gormley v. *Clark*, 134 U. S. 338.
Bertrand v. *Taylor*, 87 Illinois, 235.

In Michigan two statutes exist which are strikingly in point. They are 2 Howell's Ann. Statutes, c. 294, and 3 Howell's Ann. Statutes, c. 294 A, and provide for the quieting of titles in the counties of Kent and Charlevoix.

They provide that a person in possession of land in these counties claiming ownership by freehold title may have his

interest ascertained, declared and established. Such person must file with the register of deeds and in the county clerk's office an affidavit describing the land, the interest claimed, the source of title, and thereupon such filing is considered to be the commencement of a suit by the claimant *against all persons having or claiming any interest in the land.* The claimant is required to cause to be published once a week for six successive weeks in a newspaper a notice in substance as follows: —

Land Claim.— Take notice. The undersigned claims to have an interest in and to the following described lands, namely (describing the interest claimed). Any person or persons claiming adversely must enter his or their appearance in the county clerk's office of the county of Kent (or Charlevoix) within six months after the first publication of this notice.

If no appearance is entered within the time limited, the case is referred to a commissioner, who takes the proofs of title and reports to the county court his opinion of the validity of the claim. The claimant may then upon application have a judgment of the county court confirming the report and the title certified to, and a certified copy of the judgment under the seal of the court shall be recorded in the register's office, and this record of a duly certified copy "shall be full, sufficient and conclusive evidence in all courts and places, of the title or interest set forth in the judgment." Provision is made for the appearance of adverse claimants and for the trial of such claims.

As indicating the necessity of proceedings in which unknown persons may be concluded after general notice issued, and as showing that it has been universally understood that the Legislature has the power to make provision by statute for such proceedings, we have collated and printed in full in the appendix a large number of such statutes. These statutes are entitled to great consideration.

Roller v. *Holly*, 176 U. S. 398, 413.
Loring v. *Hildreth*, 170 Mass. 328, 331.

The following table shows the number of states and the kinds of proceedings in which provision is made by statute

for summoning in unknown parties by general description: —

	No. of States.
Partition suits,	23
Bill in equity under general equity jurisdiction,	7
Escheat proceedings,	9
Suits to restore lost records or documents,	2
Suits to declare, perfect, or quiet title to land in the jurisdiction,	10
Suits to assign or discharge dower,	2
Suits to establish boundaries,	2
Suits to confirm tax titles,	1
Suits to determine extent of incumbrance to land in the jurisdiction,	1
Suits to remove incumbrance on title to land in the jurisdiction,	4

In the following cases statutes providing for proceedings to adjudicate the title to land within a state and authorizing decrees against unknown persons cited by publication have been held constitutional.

In *Belcher* v. *Mhoon*, 47 Miss. 613, a statute authorized a person claiming to hold land under a tax title, after the period for redemption had elapsed to bring a bill in chancery, to have his title perfected as against all persons having or claiming any interest in such land existing at the time it was sold for taxes. The statute provided "that any person desirous of perfecting such tax bills, after having filed his bill in the chancery court, as hereinafter provided, shall give thirty days' notice, posted at the court house door of the county in which the lands lie, and in a newspaper printed and published in said county, and if there be no such newspaper printed and published in said county, then in the newspaper published in this state by the state printer, to all persons claiming or having an interest, either legal or equitable, in said lands at the time the same were sold for taxes, to be and appear at the term of the chancery court of the county in which such lands lie and show cause against said tax title, and why the claimants' title should not be confirmed; and said notice shall only be required to be addressed 'to all persons claiming or having an interest, either legal or equitable, in the lands hereinafter described, at the

time the same were sold for taxes, and all such other persons as may be interested therein,' without designating the parties by name; and shall be as valid for all purposes to bind such parties as if directed to them by their names: *provided*, that persons interested in such lands, residing in this state, shall be made parties by name and served with process, unless the complainant or complainants shall make affidavit that their names are unknown. And non-residents having claims to the land shall also be made parties by name, and publication be made for them as in other cases in chancery; unless a like affidavit be made by complainant or complainants that their names are unknown." The court held the statute constitutional, saying: "The bill might well be classified under that head of equity jurisprudence called *quia timet*, extended by the statute much further, however, but resting on that principle. The policy of the statute is to adjudicate upon the validity of the title, not to disturb possession. We think that it is a legitimate exercise of legislative power and discretion."

In *Sullivant* v. *Weaver*, 10 Ohio, 275, a statute authorized proceedings against the heirs of decedents, without naming them where their names were unknown. A decree against unknown heirs under this statute was held valid, the court saying: "We suppose it to be within the legitimate scope of legislative power to direct the forms of process, and the system of proceeding, by which lands lying within its jurisdiction are to be affected; and it seems a convenient and necessary exercise of this power to devise the means of adjudicating the titles to land here where owners are abroad or unknown."

Perhaps the most important decision of a state court outside of Massachusetts is *Shepherd* v. *Ware*, 46 Minn. 174 (1891).

This was an action to recover possession of land. The plaintiff claimed as grantee of one Daniels in 1889. In 1882 Daniels, who had color of title to the land by virtue of certain tax sales, brought an action under the statute (Gen. Sts., 1878, c. 75, § 2) to quiet the title and determine adverse claims to the land. The defendants named were "Benjamin Human and all other persons or parties un-

known, claiming any right, title or interest in the real property described in the complaint on file in the action, and their unknown heirs." The statute (Laws of 1881, extra session, c. 81) provided that in actions to determine adverse claims to real property "the plaintiff may include as defendant in such action, and insert in the title thereof in addition to the names of such persons or parties who are known to have some title, claim, estate, lien or interest in the land in controversy the following, viz.: 'also all other persons or parties unknown, claiming any right, title, estate, lien or interest in the real estate described in the complaint herein.' And service of the summons may be had upon all such unknown persons or parties defendant by publication, as provided by law in case of non-resident defendants. And all such unknown persons or parties so served shall have the same rights as are provided by law in case of all the other defendants upon whom service is made by publication, and the action shall proceed against such unknown persons or parties in the same manner as against the defendants who are named, upon whom service is made by publication, and with like effect; and any such unknown persons or parties who have or claim any right, estate, lien or interest in the said property in controversy at the time of the commencement of the action duly served as aforesaid shall be bound and concluded by the judgment in such case, if the same is in favor of the plaintiff therein, as effectually as if the action was brought against such defendant by his or her name, and personal service of the summons obtained: *provided, however*, that such judgment shall not bind such unknown persons or parties defendant unless the plaintiff shall file a notice of *lis pendens* in the office of registry of deeds, as provided by law, before commencing the publication of the said summons, and a copy of said notice of *lis pendens* be printed and published with said summons and following next thereafter in the columns of the newspapers wherein said summons is printed and published."

In Daniels's suit summons was served by publication, and judgment was rendered by default in Daniels's favor in March, 1888, adjudging that Daniels was the owner and entitled to the possession of the premises.

The defendant claimed under the original patentee by mesne conveyances. The original patent was issued in 1857 to Benjamin Homan. The discrepancy in names (Human and Homan) was a mistake and immaterial. Mesne conveyances from the patentee were made but not recorded immediately, and at the time of Daniels's suit (in 1882) the record title was in Homan, but the title had in fact passed to one Bragg, under whom the defendant claimed. It was necessary therefore that Bragg should have been made a party to the suit brought by Daniels in order to bind the defendant — Bragg's grantee. The question was, therefore, whether the summons by publication to Homan and unknown claimants was sufficient notice to Bragg to make the judgment binding upon his grantee.

It was conceded that the statute was complied with, but the defendant contended that it was unconstitutional as depriving a person of property without due process of law.

The court in a well-considered opinion held that in this class of cases the Legislature might provide for substituted service in case of necessity in an action where the controversy relates to property which is within the jurisdiction of the court, and with a reasonable exercise of such legislative discretion the courts would not assume to interfere. The statute was therefore held constitutional.

In his dissenting opinion Mr. Justice Loring notices that the court in its opinion states that the statute provides that unknown owners should have the right to vacate the judgment within a year. But no reliance was placed upon that feature of the case by the court of Minnesota, the decision being put on the plain ground that "the Legislature may in its discretion provide for substituted service in case of necessity, or where personal notice is for any reason impracticable, in an action where the controversy relates to property which is within the jurisdiction of the court" (p. 178).

In *Loring* v. *Hildreth*, 170 Mass. 328, a bill in equity under general equity jurisdiction was brought to remove a cloud from the title to certain land in Salem, Massachusetts. The cloud consisted in the record of a deed of trust, accord-

ing to which the land was to be held for the life of two women, and at the death of either one-half was to be conveyed to her heirs or her appointees by will. The deed of trust was never delivered.

A guardian *ad litem* was appointed to represent persons unborn and unascertained, under St. 1897, c. 522, authorizing such appointment in such a case, and providing that the suit should be deemed a proceeding *in rem* against the land, and that a decree establishing or declaring the validity, nature or extent of the plaintiff's title might be entered which should operate directly on the land.

The question before the court was whether this statute was constitutional under Massachusetts Bill of Rights, Art. XII., and the Fourteenth Amendment, the defendants contending that there could be no constructive service of process on persons unborn or unascertained because no process at all could reach such persons yet unascertained and unborn. The court held that St. 1897, c. 522, was a necessity to prevent the settlement of title to land from remaining in abeyance for an indefinite period, that the necessity of such statutes was shown by the existence of others of a similar character which "have the effect to show that it has long been assumed and understood that the Legislature has power to pass statutes under which such interests may be affected," and that the statute was constitutional.

In *Hamilton* v. *Brown*, 161 U. S. 256 (1896), the question was whether a judgment in proceedings to establish an escheat bound unknown heirs notified only by publication of a notice "to all persons interested in the estate of" their ancestor.

The statute (General Laws, 1847–48, c. 145) provided that property should escheat to the state on the death of the owner without heirs. To establish the escheat a judicial proceeding by petition was provided. The statute provided that an order of notice should be published requiring "all persons interested in the estate" to appear and show cause why title to it should not be vested in the state; and it allowed all persons named in the petition and any other person claiming an interest in the estate to appear and plead.

If no person appeared judgment was to be rendered by default for the state. If any person appeared and denied the state's claim of title issue was made up and tried, and if the state prevailed it took judgment, otherwise the other party recovered costs. By § 10 it was provided that a judgment of escheat should contain a description of the property and should "*vest the title in the state.*"

The plaintiffs were heirs of one Hamilton, against whose property, after his death, a judgment of escheat had been entered after publication of notice "to all persons interested." It was held that they were barred by this judgment although they had had no notice of the proceedings. The court said: —

"The judgment is conclusive evidence of the state's title in the land, not only against any tenants or claimants having had actual notice by *scire facias*, or having appeared and pleaded, *but also against all other persons interested in the estate and having had constructive notice by publication.* . . . As to personal property, indeed, a judgment *in rem* after notice by publication only might not bind persons who had no actual notice of the proceedings, unless the thing had been first seized into the custody of the court. But it was within the power of the Legislature of Texas to provide for determining and quieting the title to real estate within the limits of the state and within the jurisdiction of the court after actual notice to all known claimants *and notice by publication to all other persons.* . . . When a person dies, the Legislature is under no constitutional obligation to leave the title to his property, real or personal, in abeyance for an indefinite period; but it may provide for promptly ascertaining, by appropriate judicial proceedings, who has succeeded to his estate. If such proceedings are had, after actual notice by service of summons to all known claimants, and constructive notice by publication to *all possible claimants* who are unknown, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the state, as by inquest of office or similar process to determine whether the estate has escheated to the public, is *due process of law.*"

It is to be remarked that the judgment in this case was expressly declared to be conclusive against all the world as well those with actual notice as those without. The case does not even allude to the possibility of reviewing the judgment.

It is objected, however, that the purpose of an inquest to establish an escheat is not to divest rights which have vested in the heir but "to ascertain whether such rights shall or shall not vest in the heir" (Record, p. 49), and that the case of *Hamilton* v. *Brown* is not applicable. But the case does not rest on this ground. As Mr. Chief Justice Holmes points out, the decision reaffirms the doctrine of *Arndt* v. *Griggs* (above), viz., that the state may provide for determining titles to its land "after actual notice to all known claimants and notice by publication to all other persons," and rests upon the analogy of a proceeding *in rem* (p. 275).

VIII.

The objection is made by the dissenting judges that the statute is unconstitutional because it authorizes a decree to be made conclusively barring persons who are not named as defendants.

It is said that by our jurisprudence no person may be barred by a judgment or decree "in a proceeding according to the course of the common law in which the plaintiff asserts rights of property adverse to his unless he is named as a party defendant" (Record, p. 46). It is admitted that the chief end of a proceeding to clear titles is to get rid of the unknown, and that an unknown claim cannot be dealt with by insuring actual notice to the unknown claimant, yet it is said that a judicial proceeding alone cannot clear titles; and that the only way in which this can be accomplished is in connection with the lapse of time on the theory of the statute of limitations because this "has been the means and the only means heretofore used under our jurisprudence to clear titles against unknown claimants." In this connection it is said: "It would be within the constitutional power of the Legislature to enact that the effect of some such decree as is provided for in this act, when properly proclaimed and served, should

have the effect to put the claimant in possession of the title so set up, and that if that possession continued unbroken and the decree setting up the applicant's title remained in force unmodified for a specified time, all the world should be barred" (Record, p. 47).

The reason given for these views is largely if not wholly based upon a consideration of the supposed requirements of "our jurisprudence." We shall assume for purposes of argument that the statement is correct that at common law titles could be cleared only by lapse of time — Does it therefore follow that the state can adopt no other way than this of clearing titles?

It would be strange indeed if this country should find itself precluded from adopting a method of land transfer which is almost universal among the English-speaking states because of the supposed effect of a constitutional limitation derived from Magna Charta, the common heritage of them all. While the British Parliament is theoretically absolute, it is the servant of the nation after all, and it would be vain to contend that in these days the practical limitations imposed upon its powers by public opinion are not sufficient to keep its statute book clear of all unjust, partial and oppressive laws. The traditions of the common law and of English liberty we should expect to be preserved in their purest form in the mother country, and when we find that a modern statute exists in England which in its essential features is the same as the one under consideration, that the system established by that statute has been made *compulsory* in parts of England, and that the same system in substance has been enacted into law in many of the English colonies, all of which take the English common law as the basis of their jurisprudence, we are bound to consider these facts in determining whether *this* statute is oppressive and unjust or whether it is reasonable and proper.

It is not a question of what the precedents of "our jurisprudence" permit. The Fourteenth Amendment does not tie us down to the principles of any one jurisprudence. In the magnificent language of Mr. Justice Matthews in *Hurtado* v. *California*, 110 U. S. 516, 530: "The Constitution of the United States was ordained, it is true, by the descendants of Englishmen, who inherited the traditions of English

law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many times. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice, *suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and, as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful form."

This court has said that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit (*Missouri* v. *Lewis*, 101 U. S. 22, 31). True, this was said with reference to the clause in the Fourteenth Amendment relating to the "equal protection of the laws," but the application of the amendment in connection with the "due process of law" clause was also referred to, and if it had been supposed that the states were confined to the jurisprudence of the common law Mr. Justice Bradley could not in his opinion have said that a state might adopt any system of judicature it saw fit (*Maxwell* v. *Dow*, 176 U. S. 581, 600). Suppose, for instance, the Province of Ontario should become a state in the Union. Can it be doubted that the Torrens law there in force might not continue unchanged and unimpaired? (*Missouri* v. *Lewis*, 101 U. S. 22, 32.) The institutions of the common law are not preserved by the Fourteenth Amendment. Jury trial in

criminal cases is one of the oldest of these institutions. Indictment in a prosecution for murder is another. And yet this court has held that the Fourteenth Amendment does not prevent a state from abolishing indictments in murder cases nor from providing for a trial of a criminal charge by a jury of eight men instead of twelve (*Hurtado* v. *California*, 110 U. S. 516; *Maxwell* v. *Dow*, 176 U. S. 581). In fact, jury trial in suits at common law in state courts may be abolished altogether (*Walker* v. *Sauvinet*, 92 U. S. 90), and this court, following *Maxwell* v. *Dow* to its logical conclusion, will undoubtedly hold that a state may, if it deems it expedient, abolish jury trials in its courts in criminal proceedings. Speaking through Mr. Justice Brewer, the court has recently said (*Brown* v. *New Jersey*, 175 U. S. 172, 175): "The state is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named [that fundamental rights must not be denied nor the provisions of the Federal Constitution be violated] it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary."

In *Brown* v. *New Jersey* (*supra*) the question was whether the statutory provisions of New Jersey for a "struck jury" were in violation of the Fourteenth Amendment. The court said (p. 176): "It [a struck jury] gives the defendant a reasonable opportunity to ascertain the qualifications of proposed jurors, and to protect himself against any supposed prejudices in the mind of any particular individual called as a juror. Whether better or not than any other method, it is certainly a fair and reasonable way of securing an impartial jury, was provided for by the laws of the state, and that is all that due process in this respect requires."

In *Hilton* v. *Guyot*, 159 U. S. 113, 204, the effect to be given in our courts to a French judgment was considered. It was objected that in the proceedings in the French court one of the plaintiffs was allowed to testify not under oath and was not subject to cross-examination, and, further, that papers were admitted in evidence that were immaterial and would have been inadmissible under our system of juris-

prudence. But the court declined to permit the judgment to be impeached on these grounds, it appearing that the practice followed was according to the law of France.

The real question, then, is not whether the statute follows the common law, nor even whether the method of clearing title by the statute is as good or better than the alleged common law method, by lapse of time. It is merely, is this a reasonable way of ascertaining and declaring title to land within the state?

That it is a reasonable method we have shown before in part. The provisions for notice are in substance the equivalent of the corresponding provisions contained in the English and Australian acts.

In the Transfer of Land Act, 1890, of the State of Victoria (54 Vict., No. 1149), which is a fair sample of the Australian legislation, the provisions for notice are by publication once at least in a newspaper, posting a copy of the notice in the office of the registrar, and on the land, and by the registrar sending copies of the notice by registered mail to persons directed to be served with notice, those stated in the application to be occupiers of the land and the occupants and owners of adjoining lands (§§ 23–27). See also the following statutes: —

Queensland, 25 Vict., No. 14, §§ 18–23.

Tasmania, 25 Vict., No. 16, §§ 17–20.

Western Australia, 56 Vict., No. 14 (1893), §§ 21–25.

New Zealand, Land Transfer Act, 49 Vict , No. 57, §§ 21–26.

England, 38–39 Vict., c. 87, §§ 7, 17, 89–92.

That the provisions for notice in the Australian acts have been sufficient is evidenced by the fact that in 1880, when reports of the workings of the Torrens system were sent to England by the governors of the Australian colonies and printed by order of the House of Commons, it appeared that in New South Wales and Tasmania no claim upon the assurance fund had been made since the act was passed eighteen years before; in South Australia, in twenty-two years, only one "trifling claim" had been made; in New Zealand no claim had been made; in Western Australia no payment had

been made from the fund; and that in Victoria £924 had been paid and the fund in 1880 was over £61,000. In Queensland and British Columbia statistics are lacking.

British Blue Book (1872), vol. 42, pp. 3, 96, 136, 153.

British Blue Book (1881), vol. 64, pp. 98, 102, 147, 150, 158.

IX.

The following cases will probably be relied on by the petitioner: —

State v. *Guilbert*, 56 Ohio St. 575.
People v. *Simon*, 176 Ill. 165.
Webster v. *Reid*, 11 How. 437.
Brown v. *Levee Commissioners*, 50 Miss. 468.
Bardwell v. *Collins*, 44 Minn. 97.

In *State* v. *Guilbert*, the Torrens Act of Ohio was held unconstitutional. The Ohio act, however, was crude and incomplete, and probably deserved the appellation "penitential scheme" which the court, in language hardly judicial, applied to it. It contained scarcely any of the provisions meant to protect the rights of persons interested in the property, and found in the Massachusetts act; and it was held to violate the state Constitution in four separate respects not material to this discussion.

The applicant was not required to state in his application the names of the holders of an estate or interest in the land adverse to his, other than those whose claims he admitted in his application (§§ 7 and 8). Immediately upon the filing of the application the notice was made up and published (§ 12). *There was no preliminary examination of title by an official examiner, as in Massachusetts*, nor indeed does there seem to be any provision requiring *such an examination at any time*. The notice was to be given *by the applicant* by publication once a week for four consecutive weeks in "some newspaper of general circulation" in the county (§ 12). According to the prescribed form of notice, it was not issued by the court nor was it directed to any one by name, but merely "to whom it may concern," and was signed by the

applicant without any official mark of authenticity (§ 13). Immediately upon the first publication the *applicant*, or some other competent person, was directed to serve each person named in the application resident of the county with a copy of the notice, and to serve other persons so named by sending a copy to them by mail (not by registered mail, as in Massachusetts) (§ 14). It is to be noted that the act did not require *adverse claimants* to be named in the application, and they therefore were not served by mail, *but only by publication*.

At the return day the court (the existing probate court or court of common pleas) heard the case if it found that "service of notice has been made as required by §§ 12 and 14" (proof of "actual notice to all adjoining owners and to all persons who appear to have any interest in or claim to the land included in the application," as is required by the Massachusetts statute (§ 22), was not provided for); or it might refer the case to a referee (§ 16) and if the court found the applicant entitled to registration it might make an order accordingly (§ 23). Upon the hearing of an application the court or referee was required to examine "all records, papers and surveys pertaining to the title" of the applicant. This apparently did not necessarily require a search in the registry of deeds.

In discussing the statute the court says (p. 619): "To authorize a court to determine the adverse claims of parties touching their right in things, judicial process is indispensable. Judicial process in its largest sense comprehends all the acts of the court from the beginning of the proceeding to its end. In a narrower sense it is 'the means of compelling a defendant to appear in court after suing out the original writ in civil and after indictment in criminal cases' (Bouvier). In every sense *it is the act of the court.** This act does not contemplate process. The notice which it prescribes is the notice of the law of admiralty. The process required by the law of the land is the process of the common law."

It is submitted that for the reasons above given (pp. 25–55) "process" as distinct from notice is not required by nat-

* The italics are our own.

ural justice and is not essential to "due process of law." If it was held essential to "the law of the land" under the Ohio Constitution the decision is purely local in its effect and is not correct as applied to the "due process of law" clause in the Fourteenth Amendment. The point, however, is immaterial, since "process," even as defined by the Ohio court, is clearly provided for by the Massachusetts statute.

But the chief defect in the Ohio law was not the absence of process. It was the absence of any provision whatsoever for notice in any form other than by publication to those claiming interests in the land even if known to the applicant. The court said as to this (pp. 617–618) that the act does not "require or contemplate that a summons or equivalent preliminary process shall issue from the court advising those who claim interest in the land to be registered that their alleged interests are to be the subject of adjudication in the proceeding. Both by the terms of the act and by the form which it *prescribes the only notice required is to be given by the applicant. In the notice so required to be given no one claiming an interest adverse to that of the applicant is to be named; although the names, places of residence and alleged interests of all who may claim adversely are known.** [By the Massachusetts act such persons must be named.] The terms of the act require that the court shall cause the applicant, or some other competent person, to serve each person named in the application, resident of the county, with a copy of the printed notice. All persons named in the application resident without the county, though within the state, shall be served by sending copies of such notice to their addresses by mail. Only those who are named in the application are required to be served even in this manner. Reference to § 7, providing what the application shall contain, and to its form as prescribed in § 8, shows that the persons to be thus named and served are the *owners* of the *land adjoining* that sought to be registered, the *occupant of the land to be registered*, if it is occupied, *and the holders of easements and estates inferior to the fee simple.**

"One known to claim the title in fee simple adversely to

* The italics are our own.

the applicant need not be named in the application nor receive a copy of the notice, though his place of residence may be within the county and known. As to him the only requirement is that he may have a chance to see a notice signed by the applicant addressed to 'whom it may concern,' containing a brief description of the land to be registered, and published in any newspaper of general circulation within the county. *That this is sufficient notice to those who are interested in the adjoining property is not denied.** Is it such notice as the law of the land requires to be given to persons claiming interests in property of the pendency of a judicial proceeding, in which such interests are to be the subject of adjudication, and in which, unless they appear, a decree will be entered precluding their further assertion?"

As appears by these remarks the real question discussed by the court was, may the rights of a claimant adverse to the applicant whose name and claim are known to the latter, and who may therefore be notified directly, be constitutionally concluded by merely publishing a general notice "to all whom it may concern," and its decision that such rights could not be so concluded was probably correct, if the proceeding was not *in rem*, because such notice would not be reasonable notice. This is the reason why the Illinois court, while upholding the Illinois act, nevertheless agreed that the Ohio act was unconstitutional (*People* v. *Simon*, 176 Ill. 165, 179). But this is not saying, had the statute required the name of such known claimant to be given, and notice by registered mail to be sent to him by a public official, and *actual notice to him to be proved*, that such would have been an unconstitutional mode of procedure. In fact, it seems to have been somewhat singularly conceded that adjoining owners were sufficiently notified by the service by mail under the act. And it is to be noted that the remarks of the court relating to the lack of provision in the Ohio act for mentioning adverse claimants known to the applicant are not applicable to the Massachusetts statute, which has been construed by the state court of last resort to mean that an applicant must state in his application the names of all per-

* The italics are our own.

sons known to set up claims of interest, whether admitted or denied by him (Record, p. 33). This construction binds the Federal court (*Tullis* v. *L. E. & W. R.R.*, 175 U. S. 348).

It does appear to have been the impression of the Supreme Court of Ohio that the Torrens system could not become law, at least in Ohio and possibly in the United States, without a constitutional amendment (pp. 629–630). But its opinion upon this point is purely *obiter*, and the case is no authority to support the objections urged against the Massachusetts act.

In *People* v. *Simon* the Torrens Act of Illinois was held constitutional. It is, however, extremely difficult to state exactly what the court decided upon certain points in that case.

The first point raised in objection was that the statute authorized judgment against a *resident* whose name was known and given in the application upon notice by publication only, the argument probably being that the service of summons was optional (§ 19). The service by mail was to be made only upon those whose addresses were given in the application, and who were not served with process (§ 21).

The court said (p. 176): "While a substituted service is permitted in some instances, particularly in case of non-residents, this is because of the necessities of the case. The act does contemplate, in some contingencies at least, actual personal service, *and the general law provides for publication as to unknown owners and persons in interest, and non-residents** (1 Starr & Curtiss, p. 563, par. 7. See Appendix B, p. lxxv). An applicant may proceed in this way, and in strict accordance with the act obtain a decree or finding as to his title *which will be binding beyond all question*,* so that even if the proper construction of the provision were that it attempted to authorize judgment against a resident notified only by publication, yet the law can be given practical effect, in which event only the particular provision would fail, and not the whole law."

So far from being adverse to our contention this language

* The italics are our own.

strengthens it. The court expressly mentions the provision for publication of notice to unknown owners and parties in interest, and refers to it as a constitutional mode of service.

The second objection was that § 26 tended to deprive persons of their property without "due process of law." That section provided that any person interested, "whether personally served, notified by publication, *or not served at all*,"* should be concluded by the decree after two years. It was said (p. 177) that "this provision seems to attempt to make a decree binding upon persons not parties to the suit, and if given effect literally would deprive persons of vested rights without due process of law." The reference to the literal effect of the section seems to point to the fact that if taken literally the words might mean that no *service at all* was required before a conclusive decree might be entered. This would be transferring property by decree without judicial proceedings at all. The court says: "Even though the language of this section may be broad enough to amount to an attempt to transfer an estate by the law or by decree, yet it is possible to carry out the purposes of the act without violating the Constitution in the respect complained of."

In view of the fact that the court had called attention to the method of serving upon unknown persons by publication it is to be assumed that such persons could be made parties in this way. The decision upon this point seems obscure but it cannot be said that the Illinois court decided that a decree barring unknown persons might not be made after service by publication.

Webster v. *Reid* was, as the court said, "an extraordinary procedure from its commencement."

In order to produce the settlement of a large tract of land owned by the half-breed Indians, and known as the "half breed lands," an act of the territory of Iowa was passed under which two men were appointed commissioners and were to receive a fixed per diem compensation. Subsequently another act was passed authorizing the commissioners to begin actions for their services against the owners of the said "half breed lands" and give notice by publica-

* The italics are our own.

tion in a newspaper, and providing that the words "owners of the half breed lands lying in Lee County" should be a sufficient designation "of the defendants in the suit." Under this act these two commissioners recovered judgments for their services, and to satisfy these two claims, aggregating a little over $2,100, the entire tract of the half breeds' land was sold, containing 119,000 acres. The case was a writ of right by a person claiming under this sale to recover possession of the tract. The defence was that the sale was invalid because the judgments were void, being obtained under an unconstitutional statute. The court sustained the point taken by the defendant, saying: "These suits were not proceedings *in rem* against the land but were *in personam* against the owners of it" (p. 459). In this case there was no personal notice nor an attachment or other proceeding against the land until after the judgments.

This was a pure action *in personam* to establish a personal obligation. But a case under the Torrens Law is *not* such an action. If it were, then non-residents could not be bound (*Pennoyer* v. *Neff*, 95 U. S. 714). Since they may lawfully be bound by the proceedings upon mere publication (*Arndt* v. *Griggs*) the proceedings are not *in personam*. If they are not *in personam* then the reasoning of this case is inapplicable, for the decision is expressly based upon the fact that the case was not a proceeding against or concerning any land within the jurisdiction of the court. The case is not authority for the statement that notice by general description (where particular description was impossible) is insufficient to authorize a court to make a decree *affecting property subject to its control* (see *Hamilton* v. *Brown*, 161 U. S. 256).

In *Brown* v. *Board of Levee Commissioners* the defendant board, being duly authorized, caused certain lands to be sold by the sheriff for non-payment of levee taxes and the board bid the land in. Subsequently an act was passed which recited that the title to these lands was clouded by claims, and that it was expedient that they should be quieted, and provided that the board should file in the Chancery Court a petition "against all persons claiming or having any interest, either legal or equitable in said lands," asking for a

sale of the land. The statute provided that no one should be made defendant "by name, designation or description." The notice prescribed was by publication of a notice, accompanied by a list of the lands directed "to all parties or persons having any interest, either legal or equitable, in and to said lands" to show cause why they should not be sold for taxes or to redeem them. It is not at all surprising that this statute was held unconstitutional. Referring to the great extent of the land involved (which extended over a whole county) and the vast number of parties interested whose claims originated from different sources, the court said (p. 484): "In the history of due process of law can any precedent be found of a suit intended in so peremptory and speedy a manner to conclude so many parties and so many and such various rights?" But the real ground of the decision makes the case no authority against the statute here involved. The court expressly recognizes (p. 485) the validity of notice by publication to absent and non-resident defendants who cannot be personally served with notice in suits concerning property within the jurisdiction, and the validity of notice by general description, such as "unknown heirs of a decedent, *where the plaintiff does not know and cannot ascertain their names.*" * (See *Belcher* v. *Mhoon*, 47 Miss. 613, where the court was the same and the opinion was given by the same judge.) "But," it says (p. 485), "there is no instance in our legal history where a judicial process has been allowed in *personal suits*, dispensing with notice actual or constructive, addressed to the parties by name, to be charged thereby, *where it could be readily ascertained who they were.*" * As we have seen, the practice has been so uniform and ancient, that the defendants must be named, *if known*,* and that they must have personal notice by due service, or a constructive notice by some means which the Legislature has prescribed as calculated to come home to the party, that a departure from it in a special case would be obnoxious to the objection that it was not according 'to due process of law.' It is manifest that many, if not most, of the persons claiming these lands are non-residents of the state and of the

* The italics are our own.

respective counties where the suits were brought. *It is also evident that the names of many, if not most, of those were known or could have been known to the levee commissioners.** Yet the law directed that they should not be named defendants by name or other description."

This case, so far from being an authority against the statute discussed in the present case, should be cited as recognizing the validity of notice by publication of a general description when persons remain unknown after diligent inquiry. That this decision, made in 1874, is not regarded in Mississippi as attacking the validity of such notice is evident by the existence in the code of 1880 (§ 578) and that of 1892 (§ 498) (see Appendix B, p. xcii) of the statute providing for proceedings to confirm tax titles held constitutional in *Belcher* v. *Mhoon*, 47 Miss. 613. This statute has been constantly acted upon since 1874.

Chrismann v. *Currie*, 60 Miss. 858.
Metcalf v. *Perry*, 66 Miss. 68.

In *Bardwell* v. *Collins*, the plaintiff brought an action to enforce a mechanic's lien, alleging that the defendant, one Collins, claimed an interest. The only service was by publication, under a statute allowing service by publication in actions to foreclose mortgages or enforce mechanic's liens upon all parties against whom no personal judgment was sought, even if they were residents personally present and capable of being found. Collins (as the court presumed in its decision) *was a resident and could have been found within the jurisdiction*. The question was whether the court had jurisdiction to pronounce judgment against the defendant.

The court stated the question to be whether the Legislature might constitutionally authorize service of the summons by publication upon defendants in foreclosure suits whom it was not sought to hold personally liable for the mortgage debt, although residents of the state, and although personal service might be made upon them within its jurisdiction; and answered it in the negative.

But this case does not decide nor support the contention

* The italics are our own.

that service of notice upon known residents by registered mail with "proof of actual notice" (see Massachusetts statute, § 32, as amended), together with publication, filing a statement of *lis pendens* and posting on the land, or service upon unknown and undiscoverable persons residents or non-residents, using all such methods, except sending notice by mail, is insufficient in proceedings under the Torrens Act. Indeed, immediately after this case was decided came the decision of the same court in *Shepherd* v. *Ware*, 46 Minn. 174, discussed above, which expressly upheld a statute authorizing a judgment upon proceedings to quiet title to land in the state concluding unknown persons notified by publication of a notice addressed generally to persons unknown, claiming an interest in the real estate described. (Minn. Sts., 1894, § 5818, see Appendix B, p. xci.) Indeed, in *Shepherd* v. *Ware* the court laid stress upon the fact that the judgment affected the property only, and the defendant was not personally bound, and said (p. 177): "This aspect of the question was not considered by this court in reference to this class of actions in *Bardwell* v. *Collins*, 44 Minn. 97." The remarks of the court to the effect that an action to foreclose a mortgage "is not an action *in rem* but an action *in personam*" (p. 101) are contrary to the recent decision of this court in

Roller v. *Hardy*, 176 U. S. 398, 406.
Cf. *Bardwell* v. *Anderson* (Minn.), 9 L. R. A. 152.

Second Assignment of Error.

The point taken by the second assignment of error is that the provisions of the statute relating to transfers and dealings with registered land after original registration are unconstitutional, because they provide for depriving persons of property without due process of law.

The question here sought to be raised cannot be presented in this case. It is not material unless the provisions relating to dealings in registered land after initial registration are so closely connected with the provisions for initial registration that the latter are invalid if the former are. But such is not

the case. Assuming all the provisions relating to subsequent dealings unconstitutional, nevertheless the provisions for initial registration would be valid. A decree declaring the title would have the same effect whether subsequent transfers were effected in one way or another.

The result would be merely that registered land would be dealt with just as if it were unregistered. This is precisely what is expressly provided for in Lord Cairn's Act (38–39 Vict., c. 87). Section 49 of that act provides that "any person may create estates, rights, interests and equities in the same manner as he might do if the land were not registered."

The objections therefore to the sections attacked do not go to the validity of the whole statute.

People v. *Simon*, 176 Ill. 165, 180.

It is the rule of courts, both state and Federal, not to decide constitutional questions until the necessity for such decision arises in the record before the court.

Baker v. *Grice*, 169 U. S. 284.

In the present case, therefore, the petitioner cannot be harmed whether the provisions relating to subsequent transfers are held constitutional or not. He does not, as indeed he could not, seek in this suit to restrain any action being taken under those provisions.

If this point is waived, however, the inquiry is, are the provisions in question violative of the Fourteenth Amendment?

A state has the exclusive right to determine the manner in which land within its limits may be transferred or dealt in. The Legislature may make such regulations upon the subject as it deems best for the public welfare. It is absolute in this field.

"It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government

within whose jurisdiction the property is situated. The power of the state in this respect follows from her sovereignty within her limits as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the state, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the state." Mr. Justice Field in

United States v. *Fox*, 94 U. S. 315, 320.

See also

Langdon v. *Sherwood*, 124 U. S. 74, 81.
Arndt v. *Griggs*, 134 U. S. 316, 321.

There is nothing, therefore, to prevent the Legislature from imposing such terms as it deems proper upon the transfer of land once brought under the system. Furthermore, registration is voluntary, and the obtaining of a decree of registration amounts to an agreement running with the land, binding upon the applicant and all his successors in title, that the land shall be and forever remain registered land and subject to the provisions of the act (§ 45).

The argument against the validity of the provisions is that upon the transfer of registered land the recorder or assistant recorder may have to determine certain questions, such as the extent of the land and the nature of the estate sought to be conveyed; whether the grantor is a minor or non compos; whether he is married and whether the conveyance is in fact executed by his wife; whether a power of attorney is sufficient; and whether a sale under a mortgage or trust deed is authorized; that he decides these questions *ex parte*, and since registration is conclusive, if the interest registered is greater than the conveyance was effectual to transfer, the persons really entitled are deprived of their property.

Now the Supreme Judicial Court of Massachusetts has decided that subsequent "registration is the act of the court," and that the recorder or assistant recorder performs

23665

no judicial functions whatsoever. He acts wholly under general orders (Record, p. 38). This interpretation of the statute and the state Constitution must be accepted by this court.

Louisiana v. *Pillsbury*, 105 U. S. 278, 294.
Brown v. *New Jersey*, 175 U. S. 172.

In ordinary cases no questions at all will be presented. The duties of the recorder and his assistants will be merely ministerial. If a question arises the act provides that it shall be referred to the court for decision, and the court, "after notice to all parties and a hearing," shall prescribe the form of memorandum to be made (§ 53). As the state court says: "The act shows throughout the intent that no one shall be concluded without having a chance to be heard" (Record, p. 38).

HOSEA M. KNOWLTON,
Attorney-General of Massachusetts.

FRANKLIN T. HAMMOND,
Assistant Attorney-General of Massachusetts.

23666

APPENDIX A.

LAND REGISTRATION ACT

OF MASSACHUSETTS.

LAND REGISTRATION ACT.

[Chapter 562, Acts of 1898.]

An Act to provide for registering and confirming Titles to Land.

Be it enacted, etc., as follows:

Section 1. This act may be cited as the land registration act.

Acts 1899, c. 131, § 1.

Section 2. A court is hereby established, to be called the court of land registration, which shall have exclusive original jurisdiction of all applications for the registration of title to land within the Commonwealth, with power to hear and determine all questions arising upon such applications, and also shall have jurisdiction over such other questions as may come before it under this act, subject however to the right of appeal, as hereinafter provided. The proceedings upon such applications shall be proceedings *in rem* against the land, and the decrees shall operate directly on the land and vest and establish title thereto.

Acts 1900, c. 354, § 1.

The court shall hold its sittings in Boston, but may adjourn from time to time to such other places as the public convenience may require. In the county of Suffolk the board of aldermen of the city of Boston, and in other counties the county commissioners, shall provide suitable rooms for the sittings of the court of land registration, in the same building with or convenient to the probate court or the registry of deeds, and shall provide all necessary books and such printed blanks and stationery for use in registration proceedings as may be ordered by the court.

The court shall have jurisdiction throughout the Commonwealth, and shall always be open, except on Sundays and holidays established by law. It shall be a court of record, and shall cause to be made a seal, and to be sealed therewith all orders, process and papers made by or pro-

ceeding from the court and requiring a seal. All notices, orders and process of said court may run into any county and be returnable as the court may direct.

The court shall from time to time make general rules and forms for procedure, conforming as near as may be to the practice in the probate courts, but subject to the express provisions of this act and to general laws. Such rules and forms before taking effect shall be approved by the supreme judicial court or a justice thereof.

In this act, except where the context requires a different construction, the word court shall mean the court of land registration.

SECTION 3. The governor, with the advice and consent of the council, shall appoint two judges of the court of land registration, one of whom shall be appointed, commissioned and qualified as judge of land registration, and the other as associate judge of land registration, each to hold his office during good behavior; and any vacancy shall be filled in the manner provided by the constitution. Acts 1900, c. 384, § 1.

SECTION 4. The authority and jurisdiction of the court of land registration shall begin and take effect as soon as the judges thereof are appointed and qualified. The court may be held by a single judge, and when so held shall have all the authority and jurisdiction committed to said court. Different sessions may be held at the same time, either in the same county or in different counties, as the judges may decide, and they shall so arrange the sessions as to insure a prompt discharge of the business of the court.

SECTION 5. Citations, orders of notice, and all other process issuing from the court shall bear test of the judge of land registration, and be under the seal of the court and signed by the clerk.

SECTION 6. In case of a vacancy in the office of judge of land registration, or of his absence or inability to perform his duties, the associate judge shall perform them, until the vacancy is filled or any disability is removed.

SECTION 7. The governor, with the advice and consent of the council, shall appoint a recorder, who shall be clerk of the court, and who shall hold his office for the term of five years. He shall attend the sessions of the court and keep a docket of all causes, and shall affix the seal of the court to all process or papers proceeding therefrom and requiring a seal.

SECTION 8. The recorder shall be under the direction of the court, and shall have the custody and control of all papers and documents filed with him under the provisions of this act, and shall carefully number and index the same. Said papers and documents shall be kept in Boston in an office to be called the Land Registration Office, which shall be near the court of land registration. The recorder shall have authority, with the sanction of the court, to employ such assistants and messengers as may be necessary.

SECTION 9. The recorder may act in any county, and after land has been registered under this act he may make all memoranda affecting the title, and enter and issue certificates of title as provided herein.

SECTION 10. The registers of deeds in each registry district, after any land within their respective districts has been registered under this act, shall have the same authority as the recorder to make all memoranda affecting the title of such land, and to enter and issue new certificates of title as provided herein, and to affix the seal of the court to such certificates and duplicate certificates of title; but in executing the provisions of this act the registers of deeds shall be subject to the general direction of the recorder, in order to secure uniformity throughout the Commonwealth; and their official designation shall be assistant recorders for the registry district in which they are severally registers of deeds. In case of the death or disability of the recorder the assistant recorder for the Suffolk district shall perform the duties of the recorder until the vacancy is filled or the disability removed.

SECTION 11. The recorder and all assistant recorders shall be sworn before the judge of land registration, and a record thereof shall be made. They shall give bond in a sum to be fixed by the court, for the faithful performance of their official duties, before entering upon the same. They may administer oaths in all cases in which an oath is required, to persons appearing before them in matters pertaining to the registration of land. They shall keep accurate accounts of all moneys received as fees or otherwise, which shall be subject to examination by the controller of county accounts, in the same manner as accounts of registers of deeds, and they shall pay over such moneys quarterly to the treasurer of the Commonwealth. In case of the absence of any assistant recorder the assistant reg-

ister for the district, or if there is no assistant register the person acting as clerk in the office of the register of deeds, shall perform the duties of the assistant recorder, and the assistant recorder shall be responsible for him.

SECTION 12. The judge of land registration may appoint one or more examiners of title in each county, who shall be attorneys at law, and shall be subject to removal by the supreme judicial court. Acts 1900, c. 354, § 1.

SECTION 13. The salary of the judge of land registration shall be forty-five hundred dollars a year. The salary of the associate judge of land registration shall be four thousand dollars a year. The salaries of the recorder, assistant recorders, examiners of titles, and all assistants and messengers shall be fixed by the governor and council. All salaries and expenses of the court shall be paid from the treasury of the Commonwealth, excepting however that the salaries of the assistant recorders and expenses for clerical services incurred by the assistant recorders under said act shall be paid by their respective counties, and all fees collected by them, except those received upon the filing of applications for registration, shall be paid by them to their respective counties. All fees received with such applications shall be transmitted with the applications to the recorder. So much of section eleven of this act as may be inconsistent herewith is hereby repealed. Acts 1900, c. 354, § 2.

SECTION 14. Every order, decision and decree of the court of land registration shall be subject to appeal to the superior court for the county where the land lies, concerning which the order, decision or decree appealed from was made. The appeal shall be claimed and entered within thirty days from the date of such order, decision or decree, and the party appealing shall at the time of entering his appeal file in the superior court copies of all material papers in the case, certified by the recorder. Appearances and answers shall be filed in the superior court within thirty days after the appeal is entered, unless for good cause further time is allowed, and upon the motion of either party the cause shall be advanced for speedy hearing, and shall be tried by the court, unless either party within the time allowed for entering appearance claims trial by jury, in which case issues for the jury shall be framed. Questions of law arising in the superior Acts 1899, c. 131, § 2.

court may be taken to the supreme judicial court for revision by any party aggrieved, in the same manner as in proceedings at law in the superior court.

Questions of law arising in the court of land registration on any decision or decree may be taken by any party direct to the supreme judicial court for revision, in the same manner as questions of law are taken to that court from the superior court. The court of land registration after any decision or decree dependent upon the determination of questions of law may report such decision or decree for the consideration of the full bench of the supreme judicial court, with so much of the case as is necessary for understanding such questions of law.

Acts 1899, c. 131, § 3.

SECTION 15. At the end of the proceedings on appeal the clerk of the appellate court shall certify to the court of land registration the final decision on the appeal, and the court of land registration shall enter the final decree in the cause, in accordance with the certificate of the clerk of the appellate court.

SECTION 16. If the party appealing does not duly prosecute his appeal within the time limited the original order, decision or decree shall stand as if no appeal had been taken.

SECTION 17. The court of land registration in all matters over which it has jurisdiction may enforce its orders or decrees, in the same manner as decrees are enforced in equity, and upon the request of the judge of land registration the sheriff of any county shall assign a deputy to attend the sittings of the court in that county.

SECTION 18. Costs shall be taxed as in the superior court sitting in equity, where no different provision is made.

ORIGINAL REGISTRATION.

Acts 1900, c. 354, § 3.

SECTION 19. Application for registration of title may be made by the following persons, namely:

First. The person or persons claiming, singly or collectively, to own the legal estate in fee simple.

Second. The person or persons claiming, singly or collectively, to have the power of appointing or disposing of the legal estate in fee simple.

Third. Infants and other persons under disability may make application by their legally appointed guardians; but the person in whose behalf the application is made shall be named as applicant.

Fourth. Corporations may make application by any officer duly authorized by a vote of the directors: *provided, however*, that one or more tenants for a term of years, which is regarded as a fee simple in section one of chapter one hundred and twenty-one of the Public Statutes, shall not be allowed to make application except jointly with those claiming the reversionary interest which makes up the fee simple at common law; nor shall a mortgagor make application without the consent in writing of the mortgagee; nor a married woman without the consent in writing of her husband, unless she holds the land as her separate property or has a power to appoint the same in fee simple, or has obtained a decree of the probate court under the provisions of chapter two hundred and fifty-five of the acts of the year eighteen hundred and eighty-five, as amended by chapter two hundred and ninety of the acts of the year eighteen hundred and eighty-seven; nor one or more tenants claiming undivided shares less than a fee simple in the whole land described in the application.

If the holder of the mortgage does not consent to the making of the application it may be entered nevertheless and the title registered subject to such mortgage, which may be dealt with or foreclosed as if the land subject to such mortgage had not been registered. But the decree of registration in such case shall state that registration is made subject to such mortgage, describing it, which has not been registered, and shall provide that no subsequent certificate shall be issued and no further papers registered relating to such land after a foreclosure of such mortgage.

SECTION 20. The application may be filed with the recorder, or with the assistant recorder at the registry of deeds for the district in which the land, or any portion thereof, lies. Upon filing his application the applicant shall forthwith cause to be filed in the registry of deeds for the said district or districts a memorandum stating that application for registration has been filed, and the date and place of filing, and a copy of the description of the land contained in the application. This memorandum shall be recorded and indexed by the register with the records of deeds. Each assistant recorder shall also keep an index of all applications in his district, and in every case where the application is filed with him shall transmit

Acts 1899, c. 131, § 4.

the same, with the papers and plans filed therewith, and such memorandum when recorded, to the recorder.

SECTION 21. The application shall be in writing, signed and sworn to by the applicant or by some person duly authorized in his behalf. If there is more than one applicant the application shall be signed and sworn to by or in behalf of each. It shall contain a description of the land, and shall state whether the applicant is married; and if married the name of the wife or husband; and if unmarried whether he or she has been married, and if so, when and how the marriage relation terminated; and if by divorce, when, where and by what court the divorce was granted. It shall also state the name in full and the address of the applicant, and also the names and addresses of the adjoining owners and occupants, if known; and if not known it shall state what search has been made to find them. It may be in form as follows:

COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Judge of the Court of Land Registration.

I (or we) the undersigned, hereby apply to have the land hereinafter described brought under the operation and provisions of the land registration act, and to have my (or our) title therein registered and confirmed. And I (or we) declare: (1) That I am (or we are) the owner (or owners) in fee simple of a certain parcel of land with the buildings (if any, and if not, strike out the clause), situate in (here insert accurate description). (2) That said land at the last assessment for taxation was assessed at dollars; and the buildings (if any) at dollars. (3) That I (or we) do not know of any mortgage or encumbrance affecting said land, or that any other person has any estate or interest therein, legal or equitable, in possession, remainder, reversion or expectancy. (If any, add "other than as follows", and set forth each clearly.) (4) That I (or we) obtained title (if by deed, state name of grantor, date and place of record, and file the deed or state reason for not filing. If in any other way, state it). (5) That said land is occupied. (If occupied state name in full and place of residence and post office address of occupant and the nature of his occupancy. If unoccupied, insert "not.") (6) That the names in full and addresses as far as known to me (or us) of the occupants of all lands adjoining said land are as follows: (Give street and number wherever possible. If names not known state whether inquiry has been made, and what inquiry.) (7) That the names and addresses so far as known to me (or us) of the owners of all lands adjoining the above land

are as follows: (Same directions as above.) (8) That I am (or we are) married. (Follow literally the directions given in section twenty-one of the land registration act.) (9) That my (or our) full name (or names), residence and post office address is (or are) as follows:

Dated this day of in the year eighteen hundred and ninety-

(Schedule of documents.)

(Signature.)

COMMONWEALTH OF MASSACHUSETTS.

ss. 189 .

Then personally appeared the above named , known to me to be the signer (or signers) of the foregoing application, and made oath that the statements made therein, so far as made of his (or their) own knowledge are true, and so far as made upon information and belief, that he (or they) believe them to be true, before me,

Justice of the Peace.

SECTION 22. If the applicant is not a resident of the Commonwealth he shall file with his application a paper appointing an agent residing in the Commonwealth, giving his name in full and post office address, and shall therein agree that the service of any legal process in proceedings under or growing out of the application shall be of the same legal effect when made on said agent, as if made on the applicant within the Commonwealth. If the agent dies, or removes from the Commonwealth, the applicant shall at once make another appointment; and if he fails to do so the court may dismiss the application.

SECTION 23. Amendments to the application, including joinder, substitution, or discounting as to parties, shall be allowed by the court at any time upon terms that are just and reasonable; but all amendments shall be in writing, signed and sworn to, like the original.

SECTION 24. An application may include two or more contiguous parcels of land, or two or more parcels constituting one holding under one and the same title, within the same registry district. But two or more persons claiming in the same parcels different interests, which collectively make up the legal estate in fee simple in each parcel, shall not join in one application for more than one parcel unless their interests are alike in each and every parcel. The court may at any time order an application to be amended by striking out one or more of the parcels, or by a severance of the application. Acts 1899, c. 131, § 5.

SECTION 25. If the application describes the land as bounded on a public or private way it shall state whether or not the applicant claims any and what land within the limits of the way, and whether the applicant desires to have the line of the way determined.

SECTION 26. The applicant shall file with the application a plan of the land, and all original muniments of title within his control mentioned in the schedule of documents. Such original muniments as affect land not included in the application may be withdrawn on filing certified copies of the same. When an application is dismissed or discontinued the applicant may, with the consent of the court, withdraw such original muniments of title.

Acts 1900, c. 354, § 4.

SECTION 27. When an application is made subject to an existing recorded mortgage, the holder of which has consented thereto or to a recorded lease for a term exceeding seven years, or when the registration is to be made subject to such a mortgage or lease executed after the time of the application and before the date of the transcription of the decree, the applicant shall, if required by the court, file a certified copy of such mortgage or lease, and shall cause the original, or, in the discretion of the court, a certified copy thereof to be presented for registration before a decree of registration is entered, and no registration fee shall be charged for registering such original mortgage or lease or such certified copy.

SECTION 28. The court may by general rule require facts to be stated in the application in addition to those prescribed by this act, and not inconsistent therewith, and may require the filing of any additional papers.

SECTION 29. After the filing of an application, and before registration, the land therein described may be dealt with, and instruments relating thereto shall be recorded in the same manner as if no such application had been filed; but all instruments left for record relating to such land shall be indexed in the usual manner in the registry indexes, and also in the index of applications. As soon as an application is disposed of the recorder shall make a memorandum stating the disposition of the case, and shall send the same to the register of deeds for the proper district or districts, who shall record and index it with the records of deeds, and in the index of applications. If the proceedings upon the application end in a decree of registration of title the land included therein

shall, as soon as the said decree is transcribed, as hereinafter provided in section forty-one, become registered land, and thereafter no deeds or other instruments relating solely to such land shall be recorded with the records of deeds, but shall be registered in the registration book and filed and indexed with the records and documents relating to registered land.

SECTION 30. Immediately after the filing of an application the court shall enter an order referring it to one of the examiners of title, who shall search the records and investigate all facts stated in the application, or otherwise brought to his notice, and file in the case a report thereon, concluding with a certificate of his opinion upon the title. The recorder shall give notice to the applicant of the filing of such report. If the opinion of the examiner is adverse to the applicant he shall be allowed by the court a reasonable time in which to elect to proceed further or to withdraw his application. The election shall be made in writing and filed with the recorder.

SECTION 31. If, in the opinion of the examiner, the applicant has a good title as alleged, and proper for registration, or, if the applicant after an adverse opinion of the examiner, elects to proceed further, the recorder shall, immediately upon the filing of the examiner's opinion, or the applicant's election, as the case may be, cause notice of the filing of the application to be published by the recorder in some newspaper published in the district where any portion of the lands lie. The notice shall be issued by the order of the court, attested by the recorder, and shall be in form substantially as follows:

REGISTRATION OF TITLE.

SUFFOLK ss. COURT OF LAND REGISTRATION.

To (here insert the names of all persons known to have an adverse interest, and the adjoining owners and occupants, so far as known), and to all whom it may concern:

WHEREAS an application has been presented to said court by (name or names and address in full) to register and confirm his (or their) title in the following described land (insert description).

You are hereby cited to appear at the court of land registration to be held at , in said county of on the day of A.D., , at o'clock in the forenoon, to show cause, if any you have, why the prayer

of said application should not be granted. And unless you appear at said court at the time and place aforesaid your default will be recorded, and the said application will be taken as confessed, and you will be forever barred from contesting said application or any decree entered thereon.

WITNESS , Esquire, judge of said court, this day of in the year eighteen hundred and ninety-

Attest:

Recorder.

Acts 1900, c. 354, § 5.

SECTION 32. The return day of said notice shall be not less than twenty nor more than sixty days from the date of issue. The court shall also, within seven days after publication of said notice in a newspaper, cause a copy of the same to be mailed by the recorder to every person named therein whose address is known. The court shall also cause a duly attested copy of the notice to be posted in a conspicuous place on each parcel of land included in the application, by a sheriff or deputy sheriff, fourteen days at least before the return day thereof, and his return shall be conclusive proof of such service. If the applicant requests to have the line of a public way determined the court shall order notice to be given by the recorder, by mailing a registered letter to the mayor of the city or to one of the selectmen of the town or towns in which the land lies, or, if the way is a highway, to one of the county commissioners of the county or counties in which the land lies. If the land borders on a river, navigable stream or shore, or on an arm of the sea where a river or harbor line has been established, or on a great pond, or if it otherwise appears from the application or the proceedings that the Commonwealth may have a claim adverse to that of the applicant, notice shall be given in the same manner to the attorney-general. The court may also cause other or further notice of the application to be given in such manner and to such persons as it may deem proper. The court shall, so far as it deems it possible, require proof of actual notice to all adjoining owners and to all persons who appear to have any interest in or claim to the land included in the application. Notice to such persons by mail shall be by registered letter. The certificate of the recorder that he has served the notice as directed by the court, by publishing or mailing, shall be filed in the case before the return day, and shall be conclusive proof of such service.

SECTION 33. Upon the return day of the notice, and proof of service of all orders of notice issued, the court may appoint a disinterested person to act as guardian *ad litem* for minors, and for all persons not in being, unascertained, unknown or out of the Commonwealth, who may have an interest. The compensation of the guardian or agent shall be determined by the court and paid as part of the expenses of the court. Acts 1899, c. 131, § 6.

SECTION 34. Any person claiming an interest, whether named in the notice or not, may appear and file an answer on or before the return day, or within such further time as may be allowed by the court. The answer shall state all objections to the application, and shall set forth the interest claimed by the party filing the same, and shall be signed and sworn to by him or by some person in his behalf.

SECTION 35. If no person appears and answers within the time allowed the court may at once upon motion of the applicant, no reason to the contrary appearing, order a general default to be recorded and the application to be taken for confessed. By the description in the notice, "to all whom it may concern", all the world are made parties defendant and shall be concluded by the default and order. After such default and order the court may enter a decree confirming the title of the applicant and ordering registration of the same. The court shall not be bound by the report of the examiner of title, but may require other or further proof.

SECTION 36. If in any case an appearance is entered and answer filed the cause shall be set down for hearing on the motion of either party, but a default and order shall first be entered against all persons who do not appear and answer, in the manner provided in the preceding section. The court may refer the cause or any part thereof to one of the examiners of title, as master, to hear the parties and their evidence, and make report thereof to the court. His report shall have the same weight as that of a master appointed by the superior court in equity, and he shall proceed according to the rules of said court applicable to masters, except as the same may be modified by the rules of the court of land registration. The court may in any case before decree require a survey to be made for the purpose of determining boundaries, and may order durable bounds to be set, and

referred to in the application, by amendment. The expense of survey and bounds shall be taxed in the costs of the case and may be apportioned among the parties as justice may require. If no persons appear to oppose the application such expense shall be borne by the applicant.

SECTION 37. If in any case the court finds that the applicant has not title proper for registration a decree shall be entered dismissing the application, and such decree may be ordered to be without prejudice. The applicant may withdraw his application at any time before final decree, upon terms to be fixed by the court.

SECTION 38. If the court after hearing finds that the applicant has title as stated in his application, and proper for registration, a decree of confirmation and registration shall be entered. Every decree of registration shall bind the land, and quiet the title thereto, subject only to the exceptions stated in the following section. It shall be conclusive upon and against all persons, including the Commonwealth, whether mentioned by name in the application, notice or citation, or included in the general description "to all whom it may concern." Such decree shall not be opened by reason of the absence, infancy or other disability of any person affected thereby, nor by any proceeding at law or in equity for reversing judgments or decrees; subject however to the right of any person deprived of land or of any estate or interest therein by a decree of registration obtained by fraud to file a petition for review within one year after the entry of the decree, provided no innocent purchaser for value has acquired an interest. If there is any such purchaser the decree of registration shall not be opened but shall remain in full force and effect forever, subject only to the right of appeal hereinbefore provided. But any person aggrieved by such decree in any case may pursue his remedy by action of tort against the applicant or any other person for fraud in procuring the decree.

Acts 1899, c. 131, § 7.

SECTION 39. Every applicant receiving a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land who takes a certificate of title for value and in good faith, shall hold the same free from all encumbrances except those noted on the certificate, and any of the following encumbrances which may be subsisting, namely:

First. Liens, claims or rights arising or existing under

the laws or constitution of the United States which the statutes of this Commonwealth cannot require to appear of record in the registry.

Second. Taxes within two years after the same have been committed to the collector.

Third. Any highway, town way, or any private way laid out under the provisions of section sixty-five of chapter forty-nine of the Public Statutes or any act in amendment thereof or in substitution therefor, where the certificate of title does not state that the boundary of such way has been determined.

Fourth. Any lease for a term not exceeding seven years.

Fifth. Any liability to assessment for betterments, or other statutory liability which may attach to land in this Commonwealth as a lien prior to, or independent of, the recording or registering of any paper: *provided, however*, that if there are easements or other rights appurtenant to a parcel of registered land which for any reason have failed to be registered, such easements or rights shall remain so appurtenant notwithstanding such failure, and shall be held to pass with the land until cut off or extinguished by the registration of the servient estate, or in any other manner.

Section 40. Every decree of registration shall bear date of the year, day, hour and minute of its entry, and shall be signed by the recorder. It shall state whether the owner is married or unmarried, and if married the name of the husband or wife. If the owner is under disability it shall state the nature of the disability, and if a minor shall state his age. It shall contain a description of the land as finally determined by the court, and shall set forth the estate of the owner, and also, in such manner as to show their relative priority, all particular estates, mortgages, easements, liens, attachments and other encumbrances, including rights of husband or wife, if any, to which the land or the owner's estate is subject, and may contain any other matter properly to be determined in pursuance of this act. The decree shall be stated in a convenient form for transcription upon the certificates of title hereinafter mentioned.

Section 41. Immediately upon the entry of the decree of registration the recorder shall send a certified copy thereof, under the seal of the court, to the register of

deeds for the district or districts in which the lands lie, and the register as assistant recorder shall transcribe the decree in a book to be called the registration book, in which a leaf or leaves in consecutive order shall be devoted exclusively to each title. The entry made by the assistant recorder in this book in each case shall be the original certificate of title, and shall be signed by him and sealed with the seal of the court. All certificates of title shall be numbered consecutively, beginning with number one. The assistant recorder shall in each case make an exact duplicate of the original certificate, including the seal, but putting on it the words, "Owner's duplicate certificate", and deliver the same to the owner, or to his attorney duly authorized. In case of a variance between the owner's duplicate certificate and the original certificate the original shall prevail. The certified copy of the decree of registration shall be filed and numbered by the assistant recorder, with a reference noted on it to the place of record of the original certificate of title: *provided*, *however*, that when an application includes land lying in more than one district the court shall cause the part lying in each district to be described separately by metes and bounds in the decree of registration, and the recorder shall send to the assistant recorder for each registry district a copy of the decree containing a description of the land within that district, and the assistant recorder shall register the same and issue an owner's duplicate therefor, and thereafter for all matters pertaining to registration under this act the portion in each district shall be treated as a separate parcel of land.

SECTION 42. The certificate first registered in pursuance of a decree of registration in regard to any parcel of land shall be entitled in the registration book, "Original certificate of title, entered pursuant to decree of the court of land registration, dated at" (stating time and place of entry of decree and the number of the case). The certificate shall take effect from the date of the transcription of the decree. Subsequent certificates relating to the same land shall be in like form, but shall be entitled "Transfer from No. " (the number of the next previous certificate relating to the same land), and also the words "Originally registered" (date, volume and page of registration).

SECTION 43. Where two or more persons are registered

owners as tenants in common, or otherwise, one owner's duplicate certificate may be issued for the whole land or a separate duplicate may be issued to each for his undivided share.

SECTION 44. A registered owner holding one duplicate certificate for several distinct parcels of land may surrender it, with the approval of the court, and take out several certificates for portions thereof. So a registered owner holding separate duplicate certificates for several distinct parcels may surrender them, and, with like approval, take out a single duplicate certificate for the whole land, or several certificates for different portions thereof. Any owner subdividing a tract of registered land into lots shall file with the recorder a plan of such land, when applying for a new certificate or certificates, and the court before issuing the same shall cause the plan to be verified, and require that all boundaries, streets and passageways shall be distinctly and accurately delineated thereon.

SECTION 45. The obtaining of a decree of registration and the entry of a certificate of title shall be regarded as an agreement running with the land, and binding upon the applicant and all his successors in title that the land shall be and forever remain registered land, and subject to the provisions of this act and of all acts in amendment hereof.

SECTION 46. No title to registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession.

SECTION 47. The original certificate in the registration book, any copy thereof duly certified under the signature of the recorder or an assistant recorder, and the seal of the court, and also the owner's duplicate certificate, shall be received as evidence in all the courts of the Commonwealth, and shall be conclusive as to all matters contained therein, except so far as otherwise provided in this act.

SECTION 48. Every certificate of title shall set forth the names of all the persons whose estates make up the estate in fee simple in the whole land, and duplicate certificates may be issued to each person, but the recorder or assistant recorder shall note in the registration book and on each duplicate, to whom such duplicate was issued.

SECTION 49. The recorder, under the direction of the court, shall make and keep indexes of all applications and of all decrees of registration, and shall also index and

classify all papers and instruments filed in his office relat
ing to applications and to registered titles. The recorde
shall also, under the direction of the court, cause forms o
indexes and registration and entry books to be prepared
for the use of the assistant recorders. The court shal
prepare and adopt convenient forms of certificates o
title, and shall also adopt general forms of memoranda t
be used by the assistant recorders in registering the com
mon forms of conveyance, and other instruments to ex
press briefly their effect.

VOLUNTARY DEALING WITH LAND AFTER ORIGINAL REGISTRATION.

SECTION 50. An owner of registered land may convey
mortgage, lease, charge or otherwise deal with the sam
as fully as if it had not been registered. He may us
forms of deeds, mortgages, leases or other voluntary in
struments like those now in use and sufficient in law fo
the purpose intended. But no deed, mortgage or othe
voluntary instrument, except a will and a lease for a ter
not exceeding seven years, purporting to convey or affec
registered land, shall take effect as a conveyance or bin
the land, but shall operate only as a contract between th
parties, and as evidence of authority to the recorder o
assistant recorder to make registration. The act of regis
tration shall be the operative act to convey or affect th
land, and in all cases under this act the registration sha
be made in the office of the assistant recorder for the dis
trict or districts where the land lies.

SECTION 51. Every conveyance, lien, attachment, orde
decree, instrument or entry affecting registered land, whic
would under existing laws, if recorded, filed or entered i
the registry of deeds, affect the real estate to which it re
lates, shall, if registered, filed or entered in the office of th
assistant recorder of the district where the real estate t
which such instrument relates lies, be notice to all perso
from the time of such registering, filing or entering.

SECTION 52. No new certificate shall be entered o
issued upon any transfer of registered land which does no
divest the title in fee simple from the owner or some on
of the registered owners. All interests in registered lan
less than an estate in fee simple shall be registered b
filing with an assistant recorder the instrument creatin
or transferring or claiming such interest and by a bri

memorandum thereof made by an assistant recorder upon the certificate of title, and signed by him. A similar memorandum shall also be made on the owner's duplicate. The cancellation or extinguishment of such interests shall be registered in the same manner.

SECTION 53. Where the assistant recorder is in doubt upon any question, or where any party in interest does not agree as to the proper memorandum to be made in pursuance of any deed, mortgage or other voluntary instrument presented for registration, the question shall be referred to the court for decision, either on the certificate of the assistant recorder stating the question upon which he is in doubt, or upon the suggestion in writing of any party in interest; and the court, after notice to all parties and a hearing, shall enter an order prescribing the form of memorandum to the assistant recorder, who shall make registration in accordance therewith.

SECTION 54. Every deed or other voluntary instrument presented for registration shall contain or have indorsed upon it the full name, place of residence, and post office address of the grantee or other person acquiring or claiming an interest under such instrument, and every deed shall also state whether the grantee is married or unmarried, and if married, give the name in full of the husband or wife. Any change in the residence or post office address of such person shall be endorsed by an assistant recorder on the original instrument, on receiving a sworn statement of such change. All names and addresses shall also be entered on all certificates. Notices and process issued in relation to registered land in pursuance of this act may be served upon any person in interest by mailing the same to the address so given, and shall be binding, whether such person resides within or without the Commonwealth.

SECTION 55. No new certificate of title shall be entered, and no memorandum shall be made upon any certificate of title by the recorder or any assistant recorder, in pursuance of any deed or other voluntary instrument, unless the owner's duplicate certificate is presented with such instrument, except in cases expressly provided for in this act or upon the order of the court, for cause shown; and whenever such order is made a memorandum thereof shall be entered on the new certificate of title and on the owner's duplicate. The production of the owner's duplicate cer-

tificate whenever any voluntary instrument is presented for registration shall be conclusive authority from the registered owner to the recorder or any assistant recorder to enter a new certificate or to make a memorandum of registration in accordance with such instrument, and the new certificate or memorandum shall be binding upon the registered owner and upon all persons claiming under him, in favor of every purchaser for value and in good faith: *provided, however*, that in all cases of registration procured by fraud the owner may pursue all his legal and equitable remedies against the parties to such fraud, without prejudice however to the rights of any innocent holder for value of a certificate of title; and *provided, further*, that after the transcription of the decree of registration on the original application any subsequent registration under this act procured by the presentation of a forged duplicate certificate, or of a forged deed or other instrument, shall be null and void. In case of the loss or theft of an owner's duplicate certificate notice shall be sent by the owner or by some one in his behalf to the assistant recorder for the district in which the land lies, as soon as the loss or theft is discovered.

SECTION 56. Each assistant recorder shall keep an entry book in which he shall enter in the order of their reception all deeds and other voluntary instruments, and all copies of writs or other process filed with him relating to registered land. He shall note in such book the year, month, day, hour and minute of reception of all instruments, in the order in which they are received. They shall be regarded as registered from the time so noted, and the memorandum of each instrument when made on the certificate of title to which it refers shall bear the same date.

Every deed or other instrument, whether voluntary or involuntary, so filed with the recorder or assistant recorder, shall be numbered and indexed, and indorsed with a reference to the proper certificate of title. All records and papers relating to registered land in the office of the recorder or of any assistant recorder shall be open to the public in the same manner as probate records are now open, subject to such reasonable regulations as the recorder, under the direction of the court, may make.

Duplicates of all deeds and voluntary instruments filed and registered may be presented with the originals, and

shall be attested and sealed by the recorder or an assistant recorder, and indorsed with the file number and other memoranda on the originals, and may be taken away by the person presenting the same.

Certified copies of all instruments filed and registered may also be obtained at any time, on payment of the assistant recorder's fees.

CONVEYANCE IN FEE.

SECTION 57. An owner desiring to convey in fee his registered land or any portion thereof shall execute a deed of conveyance, which the grantor or the grantee may present to the assistant recorder in the district where the land lies. The grantor's duplicate certificate shall be produced and presented at the same time. The assistant recorder shall thereupon, in accordance with the rules and instructions of the court, make out in the registration book a new certificate of title to the grantee, and shall prepare and deliver to him an owner's duplicate certificate. The assistant recorder shall note upon the original and duplicate certificates the date of transfer, the volume and page of the registration book where the new certificate is registered, and a reference by number to the last prior certificate. The grantor's duplicate certificate shall be surrendered, and the word "cancelled", stamped upon it. The original certificate shall also be stamped "cancelled." The deed of conveyance shall be filed and indorsed with the number and place of registration of the certificate of title of the land conveyed. Acts 1899, c. 131, § 8.

SECTION 58. When a deed in fee is for a part only of the land described in a certificate of title the assistant recorder shall also enter a new certificate and issue an owner's duplicate to the grantor for the part of the land not included in the deed. In every case of transfer the new certificate or certificates shall include all the land described in the original and surrendered certificates: *provided, however*, that no new certificate to a grantee of a part only of the land shall be invalid by reason of the failure of the assistant recorder to enter a new certificate to the grantor for the remaining unconveyed portion; and *provided, further*, that in case the land described in a certificate of title is divided into lots, designated by numbers or letters, with measurements of all the bounds, and a plan of said land has been filed with the recorder Acts 1900, c. 354, § 6.

and verified pursuant to section forty-four of said a
and a certified copy thereof is recorded in the registrat
book with the original certificate, when the registered ow
makes a deed of transfer in fee of one or more of su
lots, the assistant recorder may, instead of cancelli
such certificate and entering a new certificate to the gran
for the part of the land not included in the deed
transfer, enter on the original certificate and on t
owner's duplicate certificate a memorandum of such de
of transfer, with a reference to the lot or lots there
conveyed as designated on such plan, and that the certi
cate is cancelled as to such lot or lots; and every certi
cate with such memorandum shall be as effectual for t
purpose of showing the grantor's title to the remaind
of the land not conveyed as if the old certificate h
been cancelled and a new certificate of such land had be
entered; and such process may be repeated so long
there is convenient space upon the original certificate a
the owner's duplicate certificate for making such mem
randum of sale of lots.

SECTION 59. If at the time of any transfer there a
pears upon the registration book encumbrances or clai
adverse to the title of the registered owner they shall
stated in the new certificate or certificates, except so f
as they may be simultaneously released or discharged.

MORTGAGES.

SECTION 60. The owner of registered land may mor
gage the same by executing a mortgage deed, and su
deed may be assigned, extended, discharged, released
whole or in part, or otherwise dealt with by the mortgag
by any form of deed or instrument sufficient in law f
the purpose. But such mortgage deed, and all instr
ments assigning, extending, discharging and otherwi
dealing with the mortgage, shall be registered, and sha
take effect upon the title only from the time of registratio

SECTION 61. Registration of a mortgage shall be mad
in the manner following, to wit: — The owner's duplica
certificate shall be presented to the assistant recorder wit
the mortgage deed, and he shall enter upon the origin
certificate of title and also upon the owner's duplicate ce
tificate a memorandum of the purport of the mortgag
deed, the time of filing and the file number of the deed

and shall sign the memorandum. He shall also note upon the mortgage deed the time of filing and a reference to the volume and page of the registration book where it is registered.

The assistant recorder shall also, at the request of the mortgagee, make out and deliver to him a duplicate of the certificate of title, like the owner's duplicate, except that the words "Mortgagee's duplicate" shall be stamped upon it in large letters diagonally across its face. A memorandum of the issue of the mortgagee's duplicate shall be made upon the original certificate of title.

SECTION 62. Whenever a mortgage upon which a mortgagee's duplicate has been issued is assigned, extended or otherwise dealt with, the mortgagee's duplicate shall be presented with the instrument assigning, extending or otherwise dealing with the mortgage, and a memorandum of the instrument shall be made upon the mortgagee's duplicate certificate. When the mortgage is discharged or otherwise extinguished the mortgagee's duplicate certificate shall be surrendered and stamped "cancelled". The production of the mortgagee's duplicate certificate shall be conclusive authority to register the instrument therewith presented, subject however to all the provisions and exceptions contained in section fifty-six of this act so far as the same are applicable.

A mortgage on registered land may be discharged by the mortgagee in person on the registration book in the same manner as a mortgage on unregistered land may be discharged by an entry on the record book in the registry of deeds, and such discharge shall be attested by an assistant recorder.

SECTION 63. Mortgages of registered land may be foreclosed like mortgages of unregistered land; but in case of foreclosure by entry and possession the certificate of entry required by section two of chapter one hundred and eighty-one of the Public Statutes shall be filed and registered by an assistant recorder within thirty days after the entry, in lieu of recording. After possession has been obtained by the mortgagee or his assigns, by entry or by action, and continued for the time required by law to complete the foreclosure, he or his assigns may petition the court of registration for the entry of a new certificate, and the court, after notice to all parties in interest, shall have

jurisdiction to hear the cause, and may order the entry of a new certificate on such terms as equity and justice may require.

In case of foreclosure by action as provided in chapter one hundred and eighty-one of the Public Statutes, and by exercising the power of sale in the mortgage under the direction of the court as provided therein, a certified copy of the final decree of the court confirming the sale may be filed with the assistant recorder, after the time for appealing therefrom has expired, and the purchaser shall thereupon be entitled to the entry of a new certificate.

In case of foreclosure by exercising the power of sale without a previous decree of court the affidavit required by section eighteen of chapter one hundred and eighty-one of the Public Statutes shall be filed and registered with the assistant recorder, in lieu of recording. The purchaser at the foreclosure sale or his assigns may thereupon at any time present the deed under the power of sale to the assistant recorder for filing and registration, and obtain a new certificate, the owner's duplicate certificate and the mortgagee's duplicate, if any, being first delivered up and cancelled: *provided*, *however*, that nothing contained in this act shall be construed to prevent the mortgagor or other person in interest from directly impeaching, by bill in equity or otherwise, any foreclosure proceedings affecting registered land, prior to the entry of a new certificate of title.

After a new certificate of title has been entered no judgment recovered on the mortgage note for any balance due thereon shall operate to open the foreclosure or effect the title to registered land.

LEASES.

SECTION 64. Leases of registered land for a term of seven years or more shall be registered, in lieu of recording. A lessee's duplicate certificate may be issued to the lessee upon his request, subject to the provisions hereinbefore made in regard to a mortgagee's duplicate certificate, so far as the same are applicable.

TRUSTS.

SECTION 65. Whenever a deed or other instrument is filed for the purpose of transferring registered land in trust, or upon any equitable condition or limitation ex-

pressed therein, or for the purpose of creating or declaring a trust or other equitable interest in such land without transfer, the particulars of the trust, condition, limitation or other equitable interest shall not be entered on the certificate; but a memorandum thereof shall be entered by the words "in trust", or "upon condition", or other apt words, and by a reference by number to the instrument authorizing or creating the same. A similar memorandum shall be made upon the duplicate certificate. The assistant recorder shall note upon the original instrument creating or declaring the trust or other equitable interest a reference by number to the certificate of title to which it relates, and to the volume and page in the registration book where it is registered. If the instrument creating or declaring a trust or other equitable interest is already recorded in the registry of deeds or of probate a certified copy may be filed by the assistant recorder and registered.

Section 66. If the instrument creating or declaring a trust or other equitable interest contains an express power to sell, mortgage or deal with the land in any manner, such power shall be stated in the certificate of title by the words "with power to sell", or "with power to mortgage", and by apt words of description in case of other powers. No instrument transferring, mortgaging or in any way dealing with registered land held in trust shall be registered, unless the power thereto enabling is expressly conferred in the instrument of trust, or unless the decree of a court of competent jurisdiction on a bill for instructions or other proceeding has construed the instrument in favor of the power, in which case a certified copy of such decree may be filed with the assistant recorder, and he shall make registration in accordance therewith.

Section 67. When a new trustee of registered land is appointed by the supreme judicial court or the superior or probate court, a new certificate shall be entered to him upon presentation to the assistant recorder of a certified copy of the decree and the surrender of the duplicate certificate.

Section 68. Whoever claims an interest in registered land by reason of any implied or constructive trust shall file for registration a statement thereof with the assistant recorder. The statement shall contain a description of the land, and a reference to the number of the certificate

of title and the volume and page of the registration book where it is entered. Such claim shall not affect the title of a purchaser for value and in good faith before its registration.

SECTION 69. Any trustee shall have authority to file an application for registration of any land held in trust by him, unless expressly prohibited by the instrument creating the trust.

LEGAL INCIDENTS OF REGISTERED LAND.

SECTION 70. Registered land, and ownership therein, shall in all respects be subject to the same burdens and incidents which attach by law to unregistered land. Nothing contained in this act shall in any way be construed to relieve registered land or the owners thereof from any rights incident to the relation of husband and wife, or from liability to attachment on mesne process or levy on execution, or from liability to any lien of any description established by law on land and the buildings thereon, or the interest of the owner in such land or buildings, or to change the laws of descent, or the rights of partition between coparceners and other cotenants, or the right to take the same by eminent domain, or to relieve such land from liability to be recovered by an assignee in insolvency under the provisions of law relating to preferences, or to change or affect in any way any other rights or liabilities created by law and applicable to unregistered land, except as otherwise expressly provided in this act or any amendment hereof.

ATTACHMENTS AND OTHER LIENS.

SECTION 71. In every case where a writing of any description or a copy of any writ is required by law to be filed or recorded in the registry of deeds in order to create or preserve any lien, right or attachment, upon unregistered land, such writing or copy when intended to affect registered land, in lieu of recording, shall be filed and registered in the office of the assistant recorder for the same registry district in which the land lies, and, in addition to any particulars required in such papers for recording with records of deeds, shall also, except in the case of attachment on mesne process, contain a reference to the number of the certificate of title of the land to be affected, and the volume and page of the registration book where the cer-

tificate is registered, and also, if the attachment, right or lien is not claimed on all the land in any certificate of title, a description sufficiently accurate for identification, of the land intended to be affected.

SECTION 72. In every case where an attachment or other lien or adverse claim of any description is registered, and the duplicate certificate is not presented at the time of registration to the assistant recorder, he shall within twenty-four hours thereafter send notice by mail to the registered owner, stating that such paper has been registered, and requesting him to send or produce his duplicate certificate in order that a memorandum of the attachment, or other lien or adverse claim may be made thereon. If the owner neglects or refuses to comply within a reasonable time the assistant recorder shall suggest the fact to the court, and the court after notice shall enter an order to the owner to produce his certificate at a time and place to be named therein, and may enforce the order by suitable process.

SECTION 73. Attachments on mesne process and liens of every description upon registered land shall be continued, reduced, discharged and dissolved by any method sufficient in law to continue, reduce, discharge or dissolve like liens on unregistered land. All certificates or other instruments which are permitted or required by law to be recorded in the registry of deeds to give effect to the continuance, reduction, discharge or dissolution of attachments or other liens upon unregistered lands, or to give notice of such continuance, reduction, discharge or dissolution, shall in the case of like liens upon registered land be filed with the assistant recorder and registered in the registration book, in lieu of recording.

SECTION 74. All the provisions of law now in force relating to attachments of real estate and leasehold estates on mesne process shall apply to registered land, except that the duties required to be performed by the register of deeds shall be performed by the assistant recorder for the registry district where the land lies, who, in lieu of recording, shall register the facts now required to be recorded, and for that purpose shall keep books similar to those now required to be kept for attachments by registers of deeds, and the fees for registering attachments shall be the same as are now provided for recording.

SECTION 75. The name and address of the plaintiff's

attorney shall in all cases be indorsed upon the writ, where an attachment is made, and he shall be deemed to be the attorney of the plaintiff until written notice that he has ceased to be such shall be filed for registration by the plaintiff.

SECTION 76. Whenever an attachment on mesne process is continued, reduced, dissolved or otherwise affected by an order, decision or judgment of the court in which the action or proceeding in which said attachment was made is pending, or by any order of a court of insolvency, a certificate of the entry of such order, decision or judgment from the clerk or register and under the seal of the court, shall be entitled to be registered on presentation to the assistant recorder. A like certificate of the allowance by the court of an amendment which a subsequent attaching creditor or purchaser contends had the effect of dissolving an attachment, may be registered as an amendment allowed, but shall not be conclusive of dissolution, unless the court in which the action or suit is pending adjudicates that the amendment dissolved the attachment, in which case a certificate of the order, as soon as it becomes absolute, shall be registered as a dissolution of the attachment.

SECTION 77. When a mechanic's lien or lien for labor and materials is claimed upon registered and unregistered land, and the original statement required by section six of chapter one hundred and ninety-one of the Public Statutes and amendments thereof is deposited with the register of deeds and recorded, an attested copy of such statement shall be filed with the assistant recorder and registered.

SECTION 78. A lien of any description upon registered land shall be enforced in the same manner as like liens upon unregistered land. Whenever registered land is set off or sold on execution; or taken or sold for taxes, or for any assessment; or sold to enforce a lien for labor or materials; or the lien of a mortgagee or cotenant arising from a payment of taxes; or for an assessment under sections eleven to thirteen of chapter fifty-one of the Public Statutes or any act in amendment thereof; or for costs and charges for taking down dangerous structures under section seventeen of chapter four hundred and eighty-one of the acts of the year eighteen hundred and ninety-four or any act in amendment thereof; or for erecting fences along the line of a railroad corporation under section one hundred and sixteen of chapter one hundred and twelve

of the Public Statutes; or for improving meadows and swamps under sections four to seven of chapter one hundred and eighty-nine of the Public Statutes; or for flowing land under section twenty-two of chapter one hundred and ninety of the Public Statutes; or for any costs and charges incident to such liens; any execution, or copy of the execution, any officer's return, or any deed, demand, certificate or affidavit or other instrument made in the course of proceedings to enforce such liens and required by law to be recorded in the registry of deeds in the case of unregistered land, shall be filed with the assistant recorder for the district where the land lies, and registered in the registration book, and a memorandum made upon the proper certificate of title in each case as an adverse claim or encumbrance.

SECTION 79. Upon the expiration of the time allowed by law for redemption after registered land has been set off or sold on any execution, or taken or sold for the enforcement of any lien of any description, the person claiming under an execution, or under any deed or other instrument made in the course of proceedings to levy such execution or enforce any lien, may petition the court for the entry of a new certificate to him, and the application may be granted: *provided*, *however*, that every new certificate entered under this section shall contain a memorandum of the nature of the proceeding on which it is based; and *provided*, *further*, that where a new certificate is entered in pursuance of any tax title such certificate shall contain a memorandum that it is subject to the rights of redemption reserved in sections fifty-seven and seventy-six of chapter three hundred and ninety of the acts of the year eighteen hundred and eighty-eight or any acts in amendment thereof or in substitution therefor, and *provided*, *further*, that at any time prior to the entry of a new certificate the registered owner may pursue all his legal and equitable remedies to impeach or annul proceedings under executions or to enforce liens of any description.

PENDING SUITS, JUDGMENTS, DECREES AND PARTITIONS.

SECTION 80. No writ of entry, petition for partition, or other action at law, or any proceeding in equity affecting the title to real estate or the use and occupation thereof or the buildings thereon, and no judgment or decree, nor any writ of error, bill of review or other proceeding to

vacate or reverse any judgment or decree, shall have any effect upon registered land as against persons other than the parties thereto, unless a memorandum like that described in section thirteen of chapter one hundred and twenty-six of the Public Statutes and amendments thereof, containing also a reference to the number of the certificate of title of the land affected, and the volume and page of the registration book where it is entered, shall be filed and registered. This section shall not apply to attachments, levies of execution, or to proceedings for the probate of wills, or for administration, in the probate court: *provided, however*, that in case notice of the pendency of the action has been duly registered it shall be sufficient to register the judgment or decree in such action within sixty days after the rendition thereof.

SECTION 81. At any time after final judgment or decree in favor of the defendant, or other disposition in the manner specified in section fourteen of chapter one hundred and twenty-six of the Public Statutes, of any case in which a memorandum has been registered as provided in the preceding section, a certificate of the clerk stating the manner of disposal thereof, as provided in said section fourteen, shall be entitled to registration.

SECTION 82. Whenever in any real action affecting registered land judgment is entered for the plaintiff or demandant, except in actions of ejectment and actions under chapter one hundred and seventy-five of the Public Statutes, relating to terms of less than seven years, such judgment shall be entitled to registration on presentation of a certificate of the entry thereof from the clerk of the court where the action is pending, to the assistant recorder, who shall enter a memorandum upon the certificate of title of the land to which such judgment relates. If the judgment does not apply to all the land described in the certificate of title the certificate of the clerk and the memorandum entered by the assistant recorder shall contain a description of the land affected by the judgment.

SECTION 83. When in any writ of entry an execution or writ of seizin has been issued and served by the officer he shall cause an attested copy of the execution, with a return of his doings thereon, to be filed and registered within three months after the service and before the return of the execution into the clerk's office, and the demandant, in case the judgment was that he was entitled

to an estate in fee simple in the demanded premises, or in any part thereof, and for which execution issued, shall thereupon be entitled to the entry of a new certificate of title: *provided*, that in informations under chapter one hundred and eighty-two of the Public Statutes the Commonwealth shall be entitled to have the certificate of the registered owner cancelled by the court of registration as soon as judgment is rendered in its favor.

SECTION 84. When in a writ of dower judgment is entered confirming the report of the commissioners under section seven of chapter one hundred and seventy-four of the Public Statutes or when in a writ of waste judgment is entered that the plaintiff recover the place wasted, a certificate of the entry of such judgment may be registered as an encumbrance.

SECTION 85. Any decree of a court of equity affecting title or rights in registered land, whether made in the exercise of general equity jurisdiction, or in the exercise of jurisdiction conferred by statute for the quieting of titles or removing clouds from titles, as in chapter two hundred and thirty-seven of the acts of the year eighteen hundred and eighty-two, chapter two hundred and eighty-three of the acts of the year eighteen hundred and eighty-five, chapter four hundred and forty-two of the acts of the year eighteen hundred and eighty-nine, and chapter three hundred and forty of the acts of the year eighteen hundred and ninety-three, or for any similar purpose, may be registered in the same manner as a judgment at law. But every court of equity passing such a decree shall, upon application of the plaintiff or petitioner, order any parties before it to execute for registration any deed or instrument necessary to give effect to its decree, and may require the registered owner to deliver his duplicate certificate to the plaintiff or petitioner to be cancelled or to have a memorandum entered upon it by the assistant recorder. In case the person required to execute any deed or other instrument necessary to give effect to the decree is absent from the Commonwealth, or is a minor, or insane, or for any reason not amenable to the process of the court, the court may appoint some suitable person a trustee to execute such instrument, and the same when executed shall be registered and shall have full force and effect to bind the land to be affected thereby.

SECTION 86. In all proceedings for partition of regis-

tered land, or for the assignment in fee of registered land claimed by husband or wife by statutory right, after the entry of the final judgment or decree of partition and the acceptance of the report of the commissioners, a copy of the judgment or decree and of the return of the commissioners, certified by the clerk or register, as the case may be, shall be filed and registered; and thereupon, in case the land is set off to the owners in severalty, any owner shall be entitled to have a certificate entered of the share set off to him in severalty, and to receive an owner's duplicate therefor. In case the land is ordered by the court to be sold the purchaser or his assigns shall be entitled to have a certificate of title entered to him or them on presenting the deed of the commissioners for registration: *provided*, *however*, that any new certificate entered in pursuance of partition proceedings, whether by way of set off or of sale, shall contain a reference to the final judgment or decree of partition, and shall be conclusive as to the title to the same extent and against the same persons as such judgment or decree is made conclusive by the statutes applicable thereto; and *provided*, *also*, that any person holding such certificate of title or a transfer thereof shall have the right to petition the court at any time to cancel the memorandum relating to such judgment or decree, and the court, after notice and hearing, may grant the application. Such certificate shall thereafter be conclusive in the same manner and to the same extent as other certificates of title.

SECTION 87. When a certified copy of a judgment or decree for partition and of the return of the commissioners is presented for registration, if a mortgage or lease affecting a specific portion or an undivided share of the premises had previously been registered, the tenant claiming under the mortgagor or lessor shall cause the mortgage or lease and any duplicate certificate of title issued to the mortgagee or lessee to be again presented for registration, and the assistant recorder shall indorse on each a memorandum of such partition, with a description of the land set off in severalty on which such mortgage or lease remains in force. Such tenant shall not be entitled to receive his own duplicate certificate of title until such mortgage or lease has been so presented for registration.

INSOLVENCY.

SECTION 88. It shall be the duty of the messenger to register notice of the issuing of a warrant in insolvency against a debtor who is an owner of registered land, when the same is committed to him, by filing a copy thereof with the assistant recorder.

An assignee in insolvency shall be entitled to the entry of a new certificate of registered land of the debtor upon presenting and filing a certified copy of the assignment, with the insolvent's duplicate certificate of title; but the new certificate shall state that it is entered to him as assignee in insolvency.

SECTION 89. Whenever proceedings in insolvency against a registered owner of which notice has been registered are vacated by decree, or when the court of insolvency grants a discharge and orders a reconveyance of land to an insolvent debtor in proceedings under chapter two hundred and thirty-six of the acts of the year eighteen hundred and eighty-four and acts in amendment thereof, a certified copy of the decree, or of such discharge and order, may be filed and registered. If a new certificate has been entered to the assignee in insolvency as registered owner the debtor shall be entitled to the entry of a new certificate to him, and the certificate of the assignee shall be surrendered.

EMINENT DOMAIN.

SECTION 90. Whenever any land of a registered owner, or any right or interest therein, is taken by eminent domain, the Commonwealth or body politic or corporate or other authority exercising such right shall file for registration in the proper registry district a description of the registered land so taken, giving the name of each owner thereof, referring by number and place of registration in the registration book to each certificate of title, and stating what estate or interest in the land is taken, and for what purpose. A memorandum of the right or interest taken shall be made on each certificate of title by the assistant recorder, and where the fee simple is taken a new certificate shall be entered to the owner for the land remaining to him after such taking. In any case where the owner has a lien upon the land taken for his damages it shall be so stated in the memorandum of registration. All fees on account of any memorandum of registration

or entry of new certificates shall be paid by the Commonwealth or body politic or corporate or other authority taking the land.

SECTION 91. When for any reason, by operation of law, land which was taken for a public use reverts to the owner from whom it was taken or to his heirs or assigns, the court upon the petition of the person entitled to the benefit of the reversion, after notice and hearing, may order the entry of a new certificate of title to him.

TRANSFER BY DESCENT AND DEVISE.

SECTION 92. Upon the death of a registered owner his heirs at law or devisees on the expiration of thirty days after the entry of a decree of the probate court granting letters testamentary or of administration, or in case of an appeal from such decree, at any time after the entry of a final decree, may file a certified copy of the final decree of the probate court and of the will, if any, with the assistant recorder, and make application for the entry of a new certificate. The court shall issue notice to the executor and administrator and all other persons in interest, and may also give notice by publication in such newspaper or newspapers as it may deem proper, to all whom it may concern, and after hearing may direct the entry of a new certificate or certificates to the person or persons entitled as heirs or devisees. Any new certificate so entered before the final settlement of the estate of the deceased owner in the probate court shall state expressly that it is entered by transfer from the last certificate by descent or devise, and that the estate is in process of settlement. After the final settlement of the estate in the probate court, or after the expiration of the time allowed by law for bringing an action against an executor or administrator by creditors of the deceased, the heirs at law or devisees may petition the court for an order to cancel the memorandum upon their certificate, stating that the estate is in course of settlement, and the court, after notice and hearing, may grant the petition: *provided*, *however*, that the liability of heirs or devisees of registered land for claims against the estate of the deceased shall not in any way be diminished or changed.

SECTION 93. Nothing contained in this act shall in any way affect or impair the jurisdiction of the probate court to license an executor or administrator or guardian to sell

or mortgage registered land for any purpose for which a license may be granted in the case of unregistered land. The purchaser or mortgagee taking a deed executed in pursuance of such license shall be entitled to a new certificate of title, or memorandum of registration, on presenting his deed to the assistant recorder.

ASSURANCE FUND.

SECTION 94. Upon the original registration of land under this act, and also upon the entry of a certificate showing title as registered owners in heirs or devisees, there shall be paid to the recorder one tenth of one per cent. of the assessed value of the real estate, on the basis of the last assessment for municipal taxation, as an assurance fund.

SECTION 95. All money received by the recorder under the preceding section shall be paid to the treasurer of the Commonwealth. He shall keep the same invested, with the advice and approval of the governor and council, and shall report annually to the general court the condition and income thereof.

SECTION 96. Any person who without negligence on his part sustains loss or damage, or is deprived of land or of any estate or interest therein after the original registration of land under this act, by the registration of any other person as owner of such land or of any estate or interest therein, through fraud or in consequence of any error, omission, mistake or misdescription in any certificate of title or in any entry or memorandum in the registration book, may bring and prosecute an action of contract in the superior court for the recovery of compensation for such loss or damage or for such land or estate or interest therein from the assurance fund: *provided*, *however*, that where the person deprived of land or of any estate or interest therein in the manner above stated has right of action or other remedy for the recovery of the land or of the estate or interest therein, he shall exhaust such right of action or other remedy before resorting to the action of contract herein provided; and *provided*, *further*, that nothing in this act shall be construed to deprive the plaintiff of any action of tort which he may have against any person for such loss or damage, or deprivation of land or of any estate or interest therein. But if the plaintiff elects to pursue his remedy in tort, and also brings an action of

contract under this act, the action of contract sha
continued to await the result of the action of tort.

SECTION 97. If such action of contract is brough
recover for loss or damage or for deprivation of lan
of any estate or interest therein, arising wholly thr
any fraud, negligence, omission, mistake or misfeasan
the recorder, assistant recorder or of any of the exami
of title, in the performance of executive or minist
duties, or of any of the assistants or clerks of the reco
in the performance of their respective duties, then th
tion shall be brought against the treasurer of the Comm
wealth as sole defendant.

If such action is brought to recover for loss or dam
or deprivation of land or of any estate or interest the
arising wholly through any fraud, negligence, omiss
mistake or misfeasance of some person or persons o
than the recorder, assistant recorder or the other offi
and assistants above-named, or arising jointly through
fraud, negligence, omission, mistake or misfeasance
such other person and the recorder, assistant recorde
other officers and assistants above-named, then such
tion shall be brought against both the treasurer of
Commonwealth and such other person or persons, as j
defendants.

SECTION 98. Where there are defendants other t
the treasurer of the Commonwealth, and where judgm
is entered for the plaintiff against the treasurer and agai
some or all of the other defendants, execution shall is
against the other defendants and be levied upon them.
the execution is returned unsatisfied in whole or in pa
and the officer returning the same certifies that the amo
due cannot be collected from the lands or goods of su
other defendants, a justice of the superior court shall
rect the clerk to certify to the governor the amount d
on the execution, and the governor shall draw his warr
therefor upon the treasurer of the Commonwealth, and t
treasurer shall pay the amount out of the assurance fu
without any further act or resolve making an appropr
tion therefor.

When in such action judgment for any reason cann
be entered against all or any of the other defendants
may be entered against the treasurer alone or against t
treasurer and such of the other defendants as are found
be liable, and against whom judgment can lawfully be e

tered. Whenever judgment is entered against the treasurer of the Commonwealth alone, whether in a case where he is sole defendant or joint defendant with others, the justice of the superior court before whom the action is tried shall direct the clerk to transmit to the governor a certificate of the entry of judgment and of the amount due, and the treasurer shall pay the same upon the warrant of the governor, as above provided.

SECTION 99. If the assurance fund at any time is not sufficient to meet the amount called for by such warrant of the governor the treasurer shall make up the deficiency from any funds in the treasury not otherwise appropriated; and in such case any sums thereafter received by the treasurer on account of the assurance fund shall be transferred to the general funds of the treasury, until the amount paid on account of the deficiency shall have been made up.

SECTION 100. In every case where payment has been made by the treasurer of the Commonwealth under warrant from the governor the Commonwealth shall be subrogated to all rights of the plaintiff against any other parties or securities, and the treasurer shall enforce the same in behalf of the Commonwealth. Any sums so recovered by the treasurer shall be paid into the treasury of the Commonwealth to the account of the assurance fund.

SECTION 101. The income of the assurance fund shall be added to the principal and invested, until said fund amounts to the sum of two hundred thousand dollars, and thereafter the income of such fund shall be used to defray, as far as may be, the expenses of the administration of this act, instead of being added to the fund and accumulated.

SECTION 102. The assurance fund shall not be liable to pay for any loss, damage or deprivation occasioned by a breach of trust, whether express, implied or constructive, by any registered owner who is a trustee, or by the improper exercise of any power of sale in a mortgage. Nor shall any plaintiff recover as compensation in an action of contract under this act more than the fair market value of the real estate at the time when he suffered the loss, damage or deprivation thereof. Acts 1899, c. 125, § 1.

SECTION 103. All actions of contract for compensation under this act by reason of any loss or damage or deprivation of land or any estate or interest therein shall be begun within the period of six years from the time when the cause

of action accrued, and not afterwards: *provided, however*, that the plaintiff in an action for the recovery of the land or estate or interest therein in accordance with section ninety-seven of this act may bring the action of contract for compensation within one year after the termination of such action; and *provided, further*, that the action of contract herein provided shall survive to the personal representative of the registered owner, unless barred in his lifetime, but the proceeds thereof shall be treated as real estate.

POWERS OF ATTORNEY.

SECTION 104. Any person may by attorney procure land to be registered and convey or otherwise deal with registered land, but the letters of attorney shall be acknowledged and filed with the recorder or the assistant recorder of the proper registry district, and registered. Any instrument revoking such letters shall be acknowledged and registered in like manner.

LOST DUPLICATE CERTIFICATES.

SECTION 105. If a duplicate certificate is lost or destroyed, or cannot be produced by a grantee, heir, devisee, assignee or other person, applying for the entry of a new certificate to him or for the registration of any instrument, a suggestion of the fact of such loss or destruction may be filed by the registered owner or other person in interest, and registered. The court may thereupon, upon the petition of the registered owner or other person in interest, after notice and hearing, direct the issue of a new duplicate certificate, which shall contain a memorandum of the fact that it is issued in place of a lost duplicate certificate, but shall in all respects be entitled to like faith and credit as the original duplicate, and shall thereafter be regarded as the original duplicate for all the purposes of this act.

ADVERSE CLAIMS.

SECTION 106. Whoever claims any right or interest in registered land adverse to the registered owner arising subsequent to the date of original registration may, if no other provision is made in this act for registering the same, make a statement in writing setting forth fully his alleged right or interest, and how or under whom acquired, and a reference to the volume and page of the certificate

of title of the registered owner, and a description of the land in which the right or interest is claimed. The statement shall be signed and sworn to, and shall state the adverse claimant's residence, and designate a place at which all notices may be served upon him. This statement shall be entitled to registration as an adverse claim, and the court, upon the petition of any party in interest, shall grant a speedy hearing upon the question of the validity of such adverse claim, and shall enter such decree thereon as justice and equity may require. If the claim is adjudged to be invalid the registration shall be cancelled. If in any case the court after notice and hearing shall find that a claim thus registered was frivolous or vexatious it may tax the adverse claimant double costs.

SURRENDER OF DUPLICATE CERTIFICATES.

SECTION 107. In every case where the recorder or any assistant recorder is requested to enter a new certificate in pursuance of an instrument purporting to be executed by the registered owner, or by reason of any instrument or proceedings which divest the title of the registered owner against his consent, if the outstanding owner's duplicate certificate is not presented for cancellation when such request is made, the recorder or assistant recorder shall not enter a new certificate, but the person claiming to be entitled thereto may apply by petition to the court. The court, after a hearing, may order the registered owner or any person withholding the duplicate certificate to surrender the same, and direct the entry of a new certificate upon such surrender.

If in any case the person withholding the duplicate certificate is not amenable to the process of the court, or if for any reason the outstanding owner's duplicate certificate cannot be delivered up, the court may by decree annul the same, and order a new certificate of title to be entered. Such new certificate and all duplicates thereof shall contain a memorandum of the annulment of the outstanding duplicate.

If in any case an outstanding mortgagee's or lessee's duplicate certificate is not produced and surrendered when the mortgage is discharged or extinguished or the lease is terminated, like proceedings may be had to obtain registration as in the case of the non-production of an owner's duplicate.

AMENDMENT AND ALTERATION OF CERTIFICATES OF TITLE.

SECTION 108. No erasure, alteration or amendment shall be made upon the registration book after the entry of a certificate of title or of a memorandum thereon and the attestation of the same by the recorder or an assistant recorder, except by order of the court. Any registered owner or other person in interest may at any time apply by petition to the court, upon the ground that registered interests of any description, whether vested, contingent, expectant or inchoate, have terminated and ceased; or that new interests have arisen or been created which do not appear upon the certificate; or that any error, omission or mistake was made in entering a certificate or any memorandum thereon, or on any duplicate certificate; or that the name of any person on the certificate has been changed; or that the registered owner has been married, or if registered as married that the marriage has been terminated; or that a corporation which owned registered land and has been dissolved has not conveyed the same within three years after its dissolution; or upon any other reasonable ground; and the court shall have jurisdiction to hear and determine the petition after notice to all parties in interest, and may order the entry of a new certificate, the entry or cancellation of a memorandum upon a certificate, or grant any other relief upon such terms and conditions, requiring security if necessary, as it may deem proper: *provided*, *however*, that this section shall not be construed to give the court authority to open the original decree of registration, and that nothing shall be done or ordered by the court which shall impair the title or other interest of a purchaser holding a certificate for value and in good faith, or his heirs or assigns, without his or their written consent.

Any petition filed under this section and all petitions and motions filed under the provisions of this act after original registration shall be filed and entitled in the original case in which the decree of registration was entered.

SERVICE OF NOTICES AFTER REGISTRATION.

SECTION 109. All notices required by or given in pursuance of the provisions of this act by the recorder or any assistant recorder, after original registration, shall be sent

by mail to the person to be notified at his residence and post office address as stated in the certificate of title, or in any registered instrument under which he claims an interest, in the office of the recorder or assistant recorder, relating to the parcel of land in question.

All notices and citations directed by special order of the court under the provisions of this act, after original registration, may be served in the manner above stated, and the certificate of the recorder shall be conclusive proof of such service: *provided, however*, that the court may in any case order different or further service, by publication or otherwise.

FEES FOR REGISTRATION.

SECTION 110. The fees payable under this act shall be as follows:

For every application to bring land under this act, including indexing and recording the same, and transmitting to recorder, when filed with assistant recorder, three dollars.

For every plan filed, seventy-five cents.

For indexing and instrument recorded while application for registration is pending, twenty-five cents.

For examining title, five dollars, and one tenth of one per cent. of the value of the land.

For each notice by mail, twenty-five cents, and the actual cost of printing.

For all services by a sheriff under this act, the same fees as are now provided by law for like services.

For each notice by publication, twenty-five cents, and the actual cost of publication.

For entry of order dismissing application, or decree of registration, and sending memorandum to assistant recorder, one dollar.

For copy of decree of registration, one dollar.

For entry of original certificate of title and issuing one duplicate certificate, three dollars.

For making and entering a new certificate of title including issue of one duplicate certificate, one dollar.

For each additional duplicate certificate, after the first, fifty cents.

For the registration of every instrument, whether single or in duplicate or triplicate, including entering, indexing and filing same and attesting registration thereof, and

also making and attesting copy of memorandum on one instrument or on a duplicate certificate when required, one dollar and fifty cents.

For making and attesting copy of memorandum on each additional instrument or duplicate certificate if required, fifty cents.

For filing and registering an adverse claim, three dollars.

For entering statement of change of residence or post-office address, including indorsing and attesting same on a duplicate certificate, twenty-five cents.

For entering any note in the entry book or in the registration book, twenty-five cents.

For the registration of a suggestion of death or notice of issue of a warrant in insolvency, twenty-five cents.

For the registration of a discharge or release of mortgage or other instrument creating an encumbrance, fifty cents.

For the registration of a memorandum or certificate of entry for possession or deposition in proof thereof, fifty cents.

For the registration of any levy, or of any discharge or dissolution of any attachment or levy, or of any certificate of or receipt for payment of taxes, or of any mechanic's lien or lien for labor or materials, or notice of any pending action or of a judgment or decree, fifty cents.

For indorsing on any mortgage, lease or other instrument a memorandum of partition, one dollar.

For every petition filed under this act after original registration, one dollar.

For a certified copy of any decree or registered instrument, the same fees as are provided by law for registers of deeds.

In all cases not expressly provided for by law the fees of all public officers for any official duty or service under this act shall be at the same rate as those prescribed herein for like services.

PENALTIES.

SECTION 111. Certificates of title and duplicate certificates issued under this act shall be subjects of larceny.

SECTION 112. Whoever knowingly swears falsely to any statement required to be made under oath by this act shall be guilty of perjury, and liable to the statutory penalties for perjury.

SECTION 113. A certificate of title, duplicate certificate

of title, certificate issued in place of a duplicate certificate, the registration book, entry book, and all indexes provided for by this act, and the docket of the recorder, shall be treated as if specifically described and enumerated in section one of chapter two hundred and four of the Public Statutes, and the various acts therein described, when done in reference to the records or instruments hereinbefore mentioned, shall be punished as provided in said section and chapter.

SECTION 114. Whoever forges or procures to be forged, or assists in forging, the seal of the court of land registration, or stamps or procures to be stamped, or assists in stamping, any document with such forged seal, or with the genuine seal of the court of land registration without being duly authorized thereto, shall be punished by imprisonment in the state prison not exceeding ten years or in the jail not exceeding two years.

SECTION 115. Whoever, with intent to defraud, sells and conveys registered land knowing that an undischarged attachment or any other encumbrance exists thereon which is not noted by memorandum on the duplicate certificate of title, without informing the grantee of such attachment or other encumbrance before the consideration is paid, shall be punished by imprisonment in the state prison not exceeding three years, or in the jail not exceeding one year.

SECTION 116. This act shall take effect upon the first day of October in the year eighteen hundred and ninety-eight. *Approved June 23, 1898.*

ORIGINAL CERTIFICATE OF TITLE.

No.

Entered pursuant to a decree of the court of land registration, dated at Boston, in the county of Suffolk and Commonwealth of Massachusetts, the day of in the year , and numbered on the files of said court.

COPY OF DECREE.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. COURT OF LAND REGISTRATION.

In the matter of the petition of numbered after consideration, the court doth adjudge and decree that said of in the county of and Commonwealth of Massachusetts, married the owner in fee simple of that certain parcel of land situate in in the county of and Commonwealth of Massachusetts, bounded and described as follows: —

And the court doth adjudge and decree that said land be brought under the operation and provisions of the land registration act and any acts in amendment thereto, and that the title of said to said land be confirmed and registered; subject, however, to any of the encumbrances mentioned in section 39 of said act as amended by chapter 131 of the Acts of 1899 which may be subsisting, and subject also to

Witness, LEONARD A. JONES, Esq., judge of the court of land registration, at Boston, in said county of Suffolk, the day of in the year at o'clock and minutes in the noon.

Attest, with the seal of said court,
CLARENCE C. SMITH, *Recorder*. [SEAL.]

A true copy. Attest, with the seal of said court,
CLARENCE C. SMITH, *Recorder*. [SEAL.]

Received for transcription at registry district, 1 , at o'clock and minutes M.

A true copy. Attest, with the seal of said court,

Assistant Recorder.

Memoranda of Encumbrances on the Land described in this Certificate.

Document Number.	Kind.	Running in Favor of—	Terms.	Date of Instrument.	Date of Registration.					Signature of Assistant Recorder.	Discharge.
					Year and Month.	D.	H.	M.	A M. or P M.		

2368

TRANSFER CERTIFICATE OF TITLE.

No.

From No. , originally registered 1,
in registration book page for the
registry district of County.

This is to certify that
of in the county of and Commonwealth of Massachusetts married
the owner
in fee simple of that certain parcel of land situate in
in the county of
and said Commonwealth, bounded and described as follows: —

And it is further certified that said land is under the operation and provisions of the land registration act, and that the title of said
to said land is registered under said act, subject, however, to any of the encumbrances mentioned in section 39 of said act as amended by chapter 131 of the Acts of 1899 which may be subsisting, and subject also to

Witness, LEONARD A. JONES, Esq., judge of the court of land registration at in said county of the
day of in the year
at o'clock and minutes in the noon.
Attest, with the seal of said court,

Assistant Recorder.

Memoranda of Encumbrances on the Land described in this Certificate.

Document Number.	Kind.	Running in Favor of —	Terms.	Date of Instrument.	Date of Registration.					Signature of Assistant Recorder.	Discharge.
					Year and Month.	D.	H.	M.	A.M. or P.M.		

INDEX TO ACT.

[Numbers relate to sections of the act.]

ACCOUNTS, of recorder and assistant recorders, subject to examination of controller, 11.

ACT, land registration, how cited, 1.
when took effect, 116.

ACTION, of tort for fraud in procuring decree, 38.
real, judgment on, how registered, 82.
of contract against assurance fund, 96.
who shall be parties to such suit, 97.
must be begun within six years, 103.

ACTION AT LAW, not to affect registered land unless memorandum is registered, 80.

ADDRESS, of owners, how and where entered, 54.
change of, to be endorsed, 54.
of plaintiff's attorney, to be on writ, 75.

ADMINISTRATION, copy of decree granting letters of, to be filed, when, 92.
memorandum of, not required, when, 80.

ADMINISTRATOR, notice to, before issue of certificates to heirs or devisees, 92.
jurisdiction of probate court to license sale or mortgage of registered land, 93.

ADVERSE CLAIMS, how registered, 106.
fee for registering, 110.

ADVERSE POSSESSION, not to run against registered land, 46.

AFFIDAVIT, of adverse claim, 106.
of sale under foreclosure to be registered, 63.

AGENT, required for foreign owner, 22.
appointed by court, compensation of, 33.

AGREEMENT, registration is, running with registered land, 45.

AMENDMENTS, what and how allowed, 23.
terms of allowance, 23.
as affecting attachments, 76.
to certificates, 108.

ANSWER, in appealed cases in superior court, 14.
when filed, by whom, and what shall contain, 34.

APPEAL, from court of registration, 14.
decision on, certified to recorder, 15.
if not prosecuted original decree to stand, 16.

APPEARANCE, in superior court in appeal cases, 14.
in court of registration, when to be made, 34.
effect of entering, 36.

APPLICATION FOR REGISTRATION, a proceeding *in rem* against the land, 2.
by whom made, 19.
by corporations, how made, 19.
by married woman, how made, 19.
by persons having power of appointment, 19.
assent of mortgagee to be obtained, 19.

APPLICATION FOR REGISTRATION — *Concluded.*
where filed, 20.
what it shall contain, 21.
form of, 21.
by non-resident, 22.
amendments to, 23.
how much land included, 24.
if land bounded on a way, 25.
to be accompanied by plan, 26.
to be accompanied by title deeds, 26.
if subject to a mortgage, 27.
by rule of court additional facts to be stated, 28.
while pending, land how dealt with, 29.
reference of, to examiner, 30.
report on, by examiner, 30.
answer to, by objectors, 34.
order of court dismissing, 37.
may be withdrawn, 37.
if land in more than one county, 41.
index of, kept by recorder, 49.
trustee may file, 69.
APPLICATION BOOK, index of applications, 30.
dealings pending registration, 29.
notice of disposal, 29.
ASSIGNEE IN INSOLVENCY, entitled to certificate of debtor's land, 88.
certificate issued to, surrendered when, 89.
order for reconveyance by, to be registered, 89.
ASSIGNMENT, of mortgage, how registered, 52.
entered on mortgagee's certificate, 62.
certified copy of, to be filed upon issue of assignee's certificate, 88.
ASSISTANTS, of court, how employed, 8.
governor and council fix salaries, 13.
ASSISTANT RECORDERS, who are, 10.
sworn before judge and give bond, 11.
may administer oaths, 11.
who act in absence of, 11.
shall keep accurate accounts of all moneys, 11.
governor and council fix salaries, 13.
may receive petitions, 20.
to transcribe copy of decree when received, 41.
how authorized to make registration of voluntary instruments, 55.
how authorized to make registration of involuntary instruments, 71, 72.
refer to court any doubtful question, 53.
conclusive authority to register, 55.
to keep entry book, 56.
duty when there is a conveyance in fee, 57.
duty if grantor retains some land, 58.
duty when a mortgage is presented, 60.
how authorized to discharge mortgage, 62.
duty when a lease is presented, 64.
how to note a trust, 65.
when liable personally, 97.
ASSURANCE FUND, how accumulated, 94–100.
action against, 96.
parties to action, 97.
payments, how made from, 98.
deficiency, how made up, 99.

INDEX

ASSURANCE FUND — *Concluded.*
income, how used, 101.
not liable in case of breach of trust, 102.
damages recoverable, 102.
actions against, to begin within six years, 103.
ATTACHMENT, filed is notice to all persons, 51.
to be noted on entry book, 56.
how made and registered, 71, 73, 74.
to be noted on duplicate certificate, 72.
how reduced, discharged, etc., 52, 73.
same provisions of law apply to registered land, 74.
writ to show attorney's address, 75.
certificates of the action or proceeding of court to be registered, 76.
ATTORNEY, name of to be endorsed on writ making attachment, 75.
powers of to be acknowledged and registered. 104.
ATTORNEY-GENERAL, when notice of application to be given to, 32.
AUTHORITY, voluntary instrument evidence of, to make registration, 50, 55, 61, 62.

BOND, of recorder and assistant recorders, 11.

CANCELLATION, of interests less than estates in fee simple, 52.
of certificates on making new, 57.
CERTIFICATES OF TITLE, recorder may issue, 9.
assistant recorders may issue, 10.
subject to what encumbrances, 39.
originals, transcripts of the decrees, 41.
how made up, 41.
original and subsequent, what are, 42.
to two or more, as tenants in common, 43.
of distinct parcels surrendered for one of all, 44.
of subdivisions of registered land, how obtained, 44.
conclusive evidence of all matters stated, 47.
shall contain what, 48.
new encumbrances, how noted, 52, 106.
new, entered only upon a transfer in fee, 52.
new, not entered unless duplicate is presented, 55.
new, production of duplicate conclusive authority to enter, 55.
forged duplicate null and void, 55.
new, how made, 57.
when grantor sells part of his registered land, 58.
new, after foreclosure of mortgage, 63, 107.
how show a trust, 66.
to new trustee, 67.
to be referred to in lien statement, etc., 71.
new, after a sale on execution, 79.
new, after judgment in a real action, 82.
new, after decree in equity, 85.
new, after judgment in partition, 86.
new, to assignee in insolvency, 88.
new, after insolvency closed, 89.
new, after land taken by eminent domain, 90.
new, after reverter, 91.
new, by descent or devise, 92.
new, by license of probate court, 93.
new, after amendment allowed, 108.
subject of larceny, 111.
See "Duplicate Certificate."

CERTIFIED COPY, of mortgage, when registered, 27.
of certificate, conclusive evidence, 47.
of certificate, may be obtained at any time, 56.
of trust instrument, when registered, 65.
CITATION, form of, 5.
CLERK OF COURT, recorder is, and duties, 7.
COMMONWEALTH, when to be notified of an application, 32.
bound by decree, 38.
subrogated to rights of plaintiff in suit against, 100.
CONDITION, equitable, how registered, 65.
CONVEYANCE, in fee, how made, 57.
of portion of registered land, 58.
in mortgage, how made, 60.
by foreclosure of mortgage, how made, 63, 107.
by lease, how made, 64.
in trust, how made, 65.
by right of eminent domain, 90.
by descent and devise, 92.
by license of probate courts, 93.
COPIES, of instruments filed duly certified may be obtained, 56.
CORPORATIONS, how apply for registration, 19.
COSTS, how taxed, 18.
of survey, how taxed, 36.
double, for frivolous claims, 106.
COUNTY COMMISSIONERS, to provide rooms for the court, 2.
COURT OF EQUITY, decrees, how registered, 85.
COURT OF LAND REGISTRATION, jurisdiction of, 2.
sittings of, 2.
always open, 2.
a court of record, 2.
rules and procedure, 2.
how constituted, 3.
sessions, how held, 4.
how enforce its decrees, 17.
not bound by report of examiner, 35.
to prepare forms of certificates, 49.
assistant recorders act under rules of, 57.
may order registered owner to produce his certificate, 72.
may order surrender or cancellation of certificate, 107.
CURTESY, a legal incident of registered land, 70.

DAMAGE, action in contract for, 96.
when action for, lies against treasurer of Commonwealth, 97.
DECISIONS, of court, how appealed from, 14.
final, on appeal to be certified to court of registration, 15.
stand, if appeal not prosecuted, 16.
of court, how enforced, 17.
DECREE, affecting registered land to be registered, 85.
court of equity may require registered owner to execute deeds, 85.
may appoint trustee to execute deeds for owner, 85.
DECREE OF REGISTRATION, appeals from, 14.
final, to be entered in accordance with certificate of appellate court, 15.
to stand if appeal not prosecuted, 16.
enforced as in equity, 17.
after transcription of, no instruments recorded, 29.
when entered, 35, 38.
dismiss, may be without prejudice, 37.

DECREE OF REGISTRATION — *Concluded.*
for registration after hearing, 38.
binds the land and quiets title, 38.
conclusive against all persons, 38.
not to be opened by reason of the disability of any person, 38.
fraudulent, when subject to review, 38.
not opened after transfer for value, 38.
subject to encumbrances named, 39.
dated and signed by recorder, 40.
what to contain, 40.
certified copy of, to be transcribed into registration book, 41.
is an agreement that land shall forever remain registered, 45.
DEED, of registered land, form and effect of, 50.
registration the operative act, 50.
filed, is notice to all persons, 51.
what should contain, 54.
may be presented and registered in duplicate, 56.
how registered, 57.
of part of grantor's land, 58.
containing power of sale, power to be stated in certificate, 66.
DEFAULT, when entered and whom concluded, 35.
DEMANDANT, judgment for, entitled to registration, 82.
when entitled to new certificate, 83.
DEPUTY SHERIFF, to attend court, when, 17.
to post notices on land and make return, 32.
DESCENT AND DEVISE, on transfer by, new certificate to issue, 92.
DESCRIPTION OF LAND, in application for registration, 21, 25.
DISABILITY, persons under, how make application, 19.
decree not opened by reason of, 38.
of owner to be stated in decree of registration, 40.
DISCHARGE, of mortgage, how effected, 52, 62.
of liens and attachments, how effected, 52-73.
DISCONTINUANCE, as to parties to application, 23.
DOCUMENTS, recorder has custody, and where kept, 8.
open to public inspection, 56.
DOCKET, of court, by whom kept, 7.
DOWER, a legal incident of registered lands, 70.
judgment in writ of, to be registered as encumbrance, 84.
DUPLICATE CERTIFICATE, issued to owner, 41.
one to each if several owners, 43.
if more than one issued, note on original, 48.
if lost, notice to be given to assistant recorder, 55.
must be presented with all instruments for registration, 55.
surrendered and cancelled on entry of new certificate, 57.
to mortgagee, when, 61.
to lessee, when, 64.
must be brought in for noting involuntary encumbrances, 72.
lost, how replaced, 105.
surrender, how enforced, 107.
penalty for keeping encumbrances from, 115.
DUPLICATE, of deeds and other instruments may be registered with originals, 56.

EASEMENTS, appurtenant to registered land to remain appurtenant, though not registered till when, 39.
ELECTION, to proceed, when, 30.
EMINENT DOMAIN, how exercised, 90.
after reversion, certificate issued to reversioner, 91.

ENCUMBRANCES, every certificate subject to what, 39.
how entered on certificates, 52.
how carried to new certificate, 59.
how discharged, 52, 62, 73, 76.
memorandum to be entered on certificate, 78.
enforcement of, 78.
judgments in writs of dower to be registered as, 84.
ENTRY, for possession, how registered and perfected, 63.
ENTRY BOOK, to be kept by assistant recorders, and contents, 56.
EQUITY, bill in, how to affect registered land, 80.
certificate of disposal entitled to registration, 81.
decree, how to affect registered land, 85.
ESTATES, making up whole title to appear in certificates, 48.
less than fee simple, registered by memorandum, 52.
EVIDENCE, conclusive, as to all matters stated in certificate, 47.
recorder's and deputy sheriff's certificate of service conclusive, 32, 109.
EXAMINERS OF TITLE, how appointed and removed, 12.
governor and council, fix compensation, 13.
reference of application to immediately, 30.
applicant's election to proceed after adverse opinion of, 31.
court not bound by report of, 35.
may act as master, 36.
when liable personally, 97.
EXECUTION, to be filed with assistant recorder and registered, 78.
lien-holder obtaining, may petition court for new certificate, 79.
memorandum of not required, pendency of action having been registered, 80.
against co-defendants only with treasurer of Commonwealth, 98.
EXECUTOR, notice to, before issuing new certificate to devisee, 92.
may have license to sell or mortgage registered land, 93.

FEES, of recorder and assistant recorders, payable to whom, 11-13.
for attachment, 74.
when eminent domain exercised, who pays, 90.
for assurance fund, 94.
under act, general provisions, 110.
FEE SIMPLE, owners of estates in, may apply for registration, 19.
FORECLOSURE OF MORTGAGE, same methods of as of unregistered land, 63.
proceedings for cancellation of owner's duplicate certificate, 107.
FORGERY, makes certificate null and void, 55.
penalties for, 113, 114.
FORMS, of indexes and certificates, 49.
of deeds and other instruments, 50.
FRAUD, effect of upon decree, 38.
certificate obtained by, 55.
remedies against parties to, 55.
remedies after original registration, 96, 97.
of registration officials and others, 97.

GOVERNOR, appoints judges and recorder, 3.
to draw warrant for amount of execution, 98.
GOVERNOR AND COUNCIL, fix salaries, etc., 13.
to advise as to investment of assurance fund, 95.
GREAT POND, notice when land borders on, 32.
GUARDIAN, application by, 19.
GUARDIAN AD LITEM, when appointed and how paid, 33.

HEIR, may have new certificate of registered land, 92.
HIGHWAY, application to state whether applicant claims land within limits of, 25.
application to state whether applicant desires to have line of determined, 25.
line of, how determined, 32.
decree subject to, if certificate does not determine boundary of, 39.
HUSBAND OR WIFE, proceedings for assignment of marital rights under statutes, 86.

INCIDENTS, legal, of registered land, 70.
INDEX, of applications kept by assistant recorders, 20.
of instruments made pending application, 29.
of recorder's memorandum stating disposition of case, 29.
form of, to be used by assistant recorders, 49.
of applications and decrees to be kept by recorder, 49.
INFANTS, application for registration by, 19.
INFANCY, decree not opened by reason of, 38.
INNOCENT PURCHASER, no right of review against, 38.
his certificate subject only to encumbrances written thereon, 39.
vendor's fraud not to affect, 55.
assumes risk of forged deed and certificate, 55.
amendments to certificates not to affect, 108.
INSOLVENCY, assignee in, may recover registered land, 70.
of owner of registered land, 88.
after discharge, new certificate, 89.
INSTRUMENT, voluntary, how take effect, 50.
voluntary, shall contain what, 54.
time of reception to be noted, 56.
registration is from time noted, 56.
to be numbered, indexed and endorsed, 56.
voluntary, how registered, 57, 61, 64, 65.
INTERESTS IN REGISTERED LAND, less than fee, how registered, 52.
under implied trust, how registered, 68.

JUDGES, how appointed, 3.
vacancy, how filled, 6.
appoint title examiners, 12.
salaries of, 13.
may require deputy sheriff to attend sessions, 17.
JUDGMENT, on mortgage note not to open foreclosure, when, 63.
notice of, to affect registered land, 80.
final, notice to be registered, 81.
in real action to be registered, 82.
in writ of entry to be registered, 83.
in writ of dower and of waste, 84.
final in partition, 86.
against treasurer of Commonwealth alone, when, 98.
JURISDICTION, of court of registration, 2.
of probate courts not impaired, 93.
JURY TRIAL, on appeal cases, when, 14.

LAND, if bounds on a way, 25.
dealt with, pending application, as before, 29.
when becomes registered land, 29.
bordering on river, sea or great pond, 32.
once registered must so remain, 45.
when sub-divided into lots, plan of, 44.

LAND — *Concluded.*
registered, how dealt with, 50.
registered has same legal incidents as unregistered land, 70.
LAND REGISTRATION OFFICE, where located and contains what, 8.
LARCENY, certificates subject of, 111.
LEASE, original or certified copy to be presented for registration, 27.
certificates subject to, for less than seven years, 39.
for more than seven years to be registered, 50, 64.
registered prior to partition, to be endorsed, 87.
LIEN, under laws of the United States, 39.
filed is notice to all persons, 51.
how filed and to contain what, 71.
how noted on owner's duplicate certificate, 72.
how discharged, 52, 73.
how filed against both kinds of land, 77.
how enforced upon registered and unregistered land, 78.
new certificate after sale to satisfy, 79.
on land taken by eminent domain, 90.
LIMITATION OF ACTION, for filing writ of review, 38.
for compensation under act, 103.
LINE OF WAY, applicant may ask to have it determined, 25.
notice of such request, 32.
LOSS OF DUPLICATE CERTIFICATE, notice to be given, 55.
procedure to obtain new, 105.

MARRIED WOMAN, when application for registration must have consent of husband, 19.
MASTER, examiner may act as, with same authority, 36.
MAYOR, when notice of application to be given to, 32.
MECHANIC'S LIEN. *See* "Lien."
MEMORANDA, affecting title, recorder may make, 9.
assistant recorder may make, 10.
forms of, 49.
of all interests less than a fee, 52.
MEMORANDUM, of filing application for registration to be recorded, 20.
of recorder stating disposition of case to be recorded, 29.
of instrument creating interest less than a fee simple, 52.
reference to court, as to the proper form of, 53.
authority for making, 55.
duplicate certificate to be presented for, 55.
of issue of mortgagee's duplicate certificate, 61.
MINOR, application by, how made, 19.
court of equity may appoint trustee to execute deed, 85.
MONEYS, received by recorder and assistant recorders, how kept and paid, 11-13.
MORTGAGE, consent of mortgagee to mortgagor's application, 19.
decree in case such consent be not given, 19.
to which application or decree is subject, 27.
to be presented for registration, 27.
when certified copy may be presented for registration, 27.
registration the operative act, 50.
filed is notice to all persons, 51.
should contain what, 54.
may be registered in duplicate and one taken away, 56
how dealt with, 60.
takes effect from time of registration, 60.
how registered, 61.
mortgagee's duplicate certificate, 61.

MORTGAGE — *Concluded.*
how assigned and discharged, 62.
how foreclosed, 63.
bill to set aside foreclosure sale, 63.
of land held in trust, 66.
on land partitioned, 87.
foreclosed, surrender of owner's duplicate, how enforced, 107.
if improperly foreclosed assurance fund not liable, 102.
MOTION, for general default, 35.
to set down case for hearing, 36.
MUNIMENTS OF TITLE, to accompany application, 26.
when may be withdrawn, 26.

NAME, of grantee in every deed to be endorsed thereon, 54.
NEGLIGENCE, one without, may sue for loss, etc., 96.
of registration officials, remedy for, 97.
NOTICE, of court, returnable as court may direct, 2.
of court, form of, 5.
of filing application to be recorded, 20.
to petitioner of filing title report, 30.
of application, to whom addressed, 31.
of application, how and when published, 31.
form of, 31.
of application, on whom and when served, 32.
to mayor or selectmen when line of public way to be determined, 32.
to attorney-general when land borders on navigable river or shore, etc., 32.
recorder's certificate of service conclusive, 32.
of application, court may order additional, 32.
of disposal of application, to be recorded, 29.
to all persons, every filed instrument to be, 51.
to registered owner, how served, 54.
to registered owner to produce duplicate certificate, 72.
of pending suit, etc., 80.
of issuing new certificate to heirs and devisees, 92.
after original registration, how served, 109.

OATH, assistant recorders may administer, 11.
by applicants for registration, 21.
form of, 21.
to amendments of application, 23.
OCCUPANTS, of adjoining land, to be named in application, 21.
of adjoining land, to be named in citation, 31.
OPERATIVE ACT, what is, to convey registered land, 50.
ORDERS OF COURT, run where and where returnable, 2.
forms of, 5.
appeal from, 14.
stand if appeal not prosecuted, 16.
how enforced, 17.
OWNERS, of adjoining land to be named in application, 21.
of adjoining land to be named in citation, 31.
of registered land may convey, mortgage, lease, etc., 50.
OWNER'S DUPLICATE CERTIFICATE, what is and who entitled to, 41.
to have memorandum of what, 52.
noted with all interests less than fee, 52.
to be presented, when, 55.
to be produced by order of court, 72.
if lost, remedy, 105.
surrender of, how enforced, 107.

PARTITION, memorandum of suit, to be registered, 80.
final judgment, how registered, 86.
memorandum of to be endorsed on mortgage or lease, 87.
PENALTY, for taking certificate wrongfully, 111.
for false oath, 112.
for mutilating records, 113.
for forgery, 114.
for conveying land subject to encumbrance not registered, etc., 115.
PERJURY, any false oath required by act, 112.
PETITION. *See* "Application."
PLAN, should accompany application, 26.
may be required by court, 36.
of subdivision of land, how approved, 44.
POST-OFFICE ADDRESS, of grantee to be endorsed on deed, 54.
any change of, to be endorsed, 54.
POSSESSION, ADVERSE, no title by, acquired in registered land, 46.
POWERS, how registered and noted, 66.
of attorney, form of, 104.
PRACTICE OF COURT, like probate courts, 2.
PRESCRIPTION, no rights by, as against registered land, 46.
PROCESSES OF COURT, where returnable, 2.
form of, 5.
how enforced, 17.
how served on foreign applicant, 22.
to compel production of certificate, 72, 107.
PROOF OF SERVICE OF NOTICES, by recorder and deputy sheriffs, 32, 109.
PUBLIC WAY, land bounded on, 25.

QUESTIONS OF LAW, taken to supreme judicial court, 14.
may be reported by court to supreme judicial court, 14.
QUIETING TITLE, decrees, how registered, 85.

RECORDER, by whom appointed, and duties, 7, 11.
acts under direction of court, 8.
may employ assistants, 8.
may act in any county, 9.
has direction of registers of deeds, 10.
pays fees quarterly to state treasurer, 11.
salary fixed by the governor and council, 13.
to send to register notice of disposal, 29.
to give petitioner notice of report of examiner, 30.
to publish notice of application, when, 31.
to mail notices to whom, 32.
certificate of service conclusive evidence, 32, 109.
duties when a case is closed, 41.
to keep indexes of applications and decrees, 49.
to prepare forms for assistant recorders, 49.
pays over assurance fund to state treasurer, 95.
when liable personally, 97.
RECORDS, open to public inspection, 56.
REGISTERED LAND, to remain subject to legal incidents, 70.
REGISTERS OF DEEDS, official designation of, and duties, 10.
REGISTRATION, a proceeding *in rem*, 2.
who may apply for, 19, 69.
decree for, when entered, 35, 38.
decree for, conclusive against all persons, 38.

REGISTRATION — *Concluded.*
every decree subject to what, 39.
decree for, how and where transcribed, 41.
the operative act to convey the land, 50.
must be made where, 50.
of interests less than estates in fee simple, 52.
dates from date of reception of instrument, 56.
of voluntary instruments, how made, 57, 61, 64, 65.
of involuntary encumbrances, how made, 71, 72.
REGISTRATION BOOK, what it is, and how kept, 41.
no alteration in, after attestation, except, etc., 108.
RETURN DAY OF NOTICE, not less than twenty or more than sixty days from issue, 32.
REVERSION, of land taken by eminent domain, 91.
REVIEW, granted if fraud shown, and title unchanged, 38.
writ of, effecting registered land, 80.
RIVER, notice when land borders on, 32.
RULES OF COURT, by whom made and approved, 2.
may require additional facts in application, 28.

SALARIES, of officials, how fixed and paid, 13.
SALE, of land, while application pending, 29.
of land, after decree for registration, 57.
power of, to be stated in certificate, 66.
of registered land by license of probate court, 93.
SEA, notice when land borders on, 32.
SEAL, court to have, 2.
to be affixed to all processes, 5.
who affixes it, 7.
to be on certificates, 10.
SELECTMEN, when notice of application to be given to, 32.
SESSIONS OF COURT, different at same time, 3.
SEVERANCE, of application may be ordered, 24.
SHERIFF, may be required by judge to have deputy attend sessions, 17.
or deputy, to post notice on land, 32.
fees for services, 110.
SUBSEQUENT CERTIFICATES, form of, 42.
SUBSTITUTION, of parties, 23.
SUITS, pending, notice of, to be filed and registered, 80.
SUPREME JUDICIAL COURT, to approve rules, 2.
to remove examiners, 12.
appeal to, 14.
report of questions of law to, 14.
clerk to certify to recorder end of appeal, 15.
SUPERIOR COURT, appeal to, 14.
jury trial in, on appealed case, 14.
to certify to governor amount due on execution against assurance fund, 96.
SURRENDER, of owner's duplicate, when conveyance in fee, 57, 63.
of mortgagee's duplicate, when mortgage is discharged, 62.
of duplicate certificates, how enforced by court, 105, 107.
SURVEY, may be ordered by court, 36.
cost of, how taxed and apportioned, 36.
SURVIVAL, of action against assurance fund, 103.

TAXES, certificate of title subject to what, 39.
memorandum of sale for, to be registered, 78.

TENANTS, for years to join in application with those having the reversion, 19.
of undivided shares, not to apply separately, 19.
in common, each may have certificate, 43.
TIME, of reception of instruments to be noted, 56.
TORT, action of, for fraud in procuring decree, 38.
action of, for loss of interest in registered land, 96.
TRANSCRIPTION, of decree, no papers recorded after, 29.
TREASURER OF COMMONWEALTH, receives moneys quarterly, 11.
pays all salaries and expenses of court, except, etc., 13.
keeps assurance fund invested, 95.
actions against, 97.
to pay executions from assurance fund, 98.
subrogated to all rights of plaintiff against assurance fund, 100.
TRUST, how registered, 65.
transfers under, 66.
implied or constructive, how noted, 68.
TRUSTEE, by new appointment, new certificate to, 67.
may always petition for registration unless prohibited, 69.
by order of court to release interest, 85.
breach of trust by, not recoverable from assurance fund, 102.

VACANCY, in court, how filled, 3.
in office of recorder, how filled, 10.
VARIANCE, in certificates, original governs, 41.

WASTE, judgment in writ of, may be registered, 84.
WAYS, land bounding on, 25.
applicant may ask to have lines of, determined, 32.
certificate subject to what, 39.
WILL, how it affects registered land, 50.
memorandum as to probate of, 80.
certified copy to be filed, when, 92.
WRIT, of review, when allowed, 38.
of execution, sale under, how registered, 79.
memorandum of, to be registered, 80.
of entry, judgment, how registered, 83.
of dower, judgment, how registered, 84.
of waste, judgment, how registered, 84

APPENDIX B.

COPIES OF STATUTES

PROVIDING FOR

JUDICIAL PROCEEDINGS BINDING PERSONS NOTIFIED BY THE PUBLICATION OF A GENERAL DESCRIPTION.

COPIES OF STATUTES.

ALABAMA.

CODE, 1896.

SECT. 690. *Publication and Proceedings against Defendants whose Names are Unknown.* — In cases where it is necessary to make any persons defendants to a bill, and the names of all or any of them are unknown to the plaintiff, and cannot be ascertained on diligent inquiry, and he annexes to his bill an affidavit that the names of such persons are unknown, that he has made diligent inquiry to ascertain the same, and that their residence as he believes, is not in this state, proceedings may be had, and a decree rendered against them without naming them; and the register must make publication as in case of non-residents, describing such unknown parties, as near as may be, by the character in which they are sued, and with reference to their title or interest in the subject matter.

SECT. 3165. *Unknown Parties; Notice; Shares paid into Court.* — When it is necessary to make any persons defendants to a bill in chancery or a petition in the probate court filed for the partition of property or for a sale thereof because it cannot be equitably divided, and the names of all or any of such persons are unknown to the complainant or petitioner and cannot be ascertained on diligent inquiry, if the complainant or petitioner shall state in a sworn bill or petition, or in an affidavit thereto annexed, that the names of such persons are unknown, and that he has made diligent inquiry to ascertain the same, proceeding may be had against them without naming them; and the register or judge of probate, as the case may be, must make publication as in case of non-resident defendants, *describing such unknown parties as near as may be by the character in which they are sued, and with reference to their title or interest in the property* sought to be partitioned or to be sold for division of the proceeds. The shares or interest of such unknown parties in the proceeds of any such sale shall be paid into court under such directions as may be ordered by the court, and shall there be retained and paid out to the proper parties when ascertained.

ARKANSAS.

STATUTES (SANDELS & HILL, 1894).

* SECT. 5418. In cases where one or more of such parties, or the share or quantity of interest of any of the parties, is unknown to the petitioner, or uncertain or contingent, or the ownership of the inheritance shall depend upon an executory device, or the remainder shall be contingent, so that such parties cannot be named, the same shall be so stated in the petition.

SECT. 2851. When the prosecuting attorney for the circuit shall be informed, or have reason to believe, that any real estate within his circuit hath escheated to the state, and such estate shall not have been sold, according to law, within three years after the death of the person last seized, for the payment of the debts of the deceased, he shall file an information, in behalf of the state, in the circuit court of the county in which such estate is situate, setting forth a description of the estate, the name of the person last lawfully seized, the names of the terre-tenants, and persons claiming the estate, if known, and the facts and circumstances in consequence of which such estate is claimed to have escheated, and alleging that, by reason thereof, the state of Arkansas hath right to such estate.

SECT. 2852. Such court shall award and issue a *scire facias* against such person, bodies politic or corporate, as shall be alleged, in such information, to hold, possess or claim such estate, requiring them to appear and show cause why such estate should not be vested in the state, at the next term of the court.

SECT. 2853. Such *scire facias* shall be served fifteen days before the return day thereof; and the court shall make an order setting forth briefly the contents of such information, and *requiring all persons interested in the estate to appear and show cause*, at the next term of the said court, why the same shall not be vested in the state; which order shall be published four weeks in some newspaper as provided in chapter XCVII.

SECT. 2854. All persons, bodies politic and bodies corporate named in such information as terre-tenants or claimants of the estate may appear and plead to such proceeding, and may traverse the facts stated in the information, or the title of the state to the lands and tenements therein mentioned, at any time on or before the third day after the return of the *scire facias;* and any other person claiming an interest in such estate may appear and be made

* This section refers to partition proceedings.

a defendant, and plead, by motion for that purpose in open court, within the time allowed for pleading.

SECT. 2855. If no person shall appear and plead, or appearing, shall refuse to plead with the term, then judgment shall be rendered that the state be seized of the lands and tenements in the information claimed.

SECT. 2859. When any judgment shall be rendered that the state be seized of any real estate, *such judgment* shall contain a description of such estate, and *shall vest the title in the state.*

CALIFORNIA.

3 DEERINGS' ANNOTATED CODE AND STATUTES.

* SECT. 756. The summons must be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment, or otherwise upon the property, or upon any particular portion thereof; and *generally, to all persons unknown who have or claim any interest in the property.*

* SECT. 757. If a party having a share or interest is *unknown*, or any one of the known parties reside out of the state, or cannot be found therein, and such fact is made to appear by affidavit, the *summons may be served on such* absent or *unknown party by publication*, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action.

* SECT. 759. The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court, before the judgment of sale can be made; and where service of the complaint has been made by publication, like proof must be required of the right of the absent or unknown parties before such judgment is rendered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves.

SECT. 766. The Court may confirm, change, modify, or set aside the report, and, if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive.

---

* Concerning partition proceedings.

1. (Not material.)

2. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication;

3. On all other persons claiming from such parties or persons, or either of them.

COLORADO.

Mills' Annotated Statutes.

Sect. 3753. *Proceedings before District Court to restore Records.* — Whenever the public records of any plat or map, or any tax list, assessment-roll, or any public record or writing connected with the assessment and collection of the revenues of such county and of the state, which is required to be kept by the county clerk and recorder of such county in his office, has been or may hereafter be lost or destroyed by fire or otherwise, it shall be the duty of the county attorney of the county in which such loss or destruction has occurred, or shall occur, to file in the district court of such county an information in the name of the people of the state of Colorado, setting forth substantially the fact of such loss or destruction of such public records, or so much thereof as may be desired to be reproduced and re-established or restored, with the circumstances attending the loss or destruction of the same, as near as may be, and thereupon the clerk of such court shall cause such information to be published in full in one or more public newspapers published in such county for the period of four weeks, together with the notice addressed, "*to all whom it may concern*," that the court will, at a term therein designated to be held, not less than four weeks from the first publication of such information and notice, proceed to hear and determine the matters in said information set forth, and will take testimony for the purpose of reproducing, re-establishing or restoring such records as the court shall find to be lost or destroyed. Upon such publication being made, *all persons interested shall be deemed defendants*, and may appear in person or by counsel and be heard touching such proceedings. If the court shall be satisfied that any public record aforesaid has been lost and destroyed, an order to that effect shall be entered of record, and thereupon the court shall proceed to take testimony for the purpose of reproducing, re-establishing or restoring the records so lost or destroyed. The proceedings may be continuous from time to time, whether in term time or not, and orders and decrees shall be made as to each record, map, plat, tax list, (and) assessment-roll, as the case may be, separately. The clerk shall cause all maps, plats, tax lists, assessment-rolls or other records adjudged

by the court to be correct copies of the records lost or destroyed, as often and as soon as they are so adjudged, to be filed in the office of the county recorder, with a certified copy of the order or judgment of the court in the premises attached thereto, and recorded in a book or books to be provided for that purpose; and the said record shall be deemed and taken in all courts and places as a public record, and as a true and correct reproduction of the original record so lost or destroyed: *Provided*, That any tax list or assessment-roll so reproduced and restored, or so much thereof as may be reproduced and restored under the provisions of this section, shall be sufficient authority for the treasurer of such county to collect all taxes contained therein, the same in all respects as if it were the original tax list or assessment-roll, and were made out, certified and delivered to him within the time required by law.

SECT. 3759. *Courts having Equity Jurisdiction have Power to make Inquiry.* — In case of such destruction of records as aforesaid, any and all courts in such county having equity jurisdiction shall have power to inquire into the conditions of any title to or interest in any land in such county, and to make all such orders, judgments and decrees as may be necessary *to determine and establish said title or interest*, legal or equitable, *against all persons, known or unknown*, and all liens existing on such lands, whether by statute, judgment, mortgage, deed of trust, or otherwise.

SECT. 3350. *Unknown and All Persons, how brought in.* — All persons interested in the premises of which partition is sought to be made according to the provisions hereof, whose names are unknown, may be made parties to such petition *by the name and description of unknown owners or proprietors of the premises, or as the unknown heirs of any person who may have been interested in the same.*

SECT. 3351. *Unknown Parties; Guardians; Summons; Publication; Guardian ad litem.* — All persons having such interest as is specified in this chapter in any premises of which partition is sought to be made, or the guardians of such as are under age, who shall not have joined in the petition (and if any person so interested be under age and without guardian the court shall appoint guardian *ad litem* for such minor) shall have notice of such application by summons duly served, which summons shall issue against such persons by the name and description given in the petition; and when the names of persons having any such interest in such premises are unknown, and when parties whose names are known do not reside in this state, or cannot be found, they shall have further notice by advertisement, as provided by law; and after such advertisement the court shall proceed to act in the premises as though

the parties had been duly served with summons, or had been notified by their proper names.

* Sect. 3358. *Confirmation; Judgment.* — If no such cause be shown, the report of the commissioners shall be confirmed and final judgment rendered thereon, which judgment shall be binding and conclusive upon all the parties to the proceedings, and all other persons claiming under them.

CONNECTICUT.

General Statutes, 1888.

Sect. 945. The several courts, other than courts of probate, and the judges, clerks, and assistant clerks thereof, or any county commissioner, in term time or in vacation, may, except where it is otherwise specially provided by law, make such order as may be deemed reasonable, in regard to the notice which shall be given of the institution or pendency of all complaints, writs of error, and appeals from probate, which may be brought to or pending in any court, when the adverse party or any persons so interested therein that they ought to be made parties thereto, reside out of the state, *or when the names or residences of any such persons in interest are unknown to the party instituting the proceeding; and such notice, having been given and proved, shall be deemed sufficient service and notice;* and the court may proceed to a hearing at the first term, or session, unless otherwise provided by law, or may order further notice as it may deem reasonable.

Sect. 946. The plaintiff in any action for equitable relief, to which it would be necessary to make the executor or administrator of a deceased person, if any, a party, and there be no such executor or administrator, may, if he sets forth in his complaint the interest of such deceased person, make his "*Representatives and creditors,*" without further or other designation or description, parties to such action; or where an action for equitable relief is brought relating to any interest in real estate belonging to or which may be claimed by the widow or heirs of any deceased person, and the plaintiff or his attorney, shall annex to the complaint in such action an affidavit stating that the plaintiff does not know who such widow or heirs or some of them, are, or where they or any of them reside, and shall in the process to such action describe as parties defendant, "*The widow and heirs,*" or, as the case may be, "*The heirs,*" of such deceased person, without further describing the names or residences of any such parties whose names and residences may be

* Concerning partition proceedings.

unknown to him, the court to which such action shall be brought or any judge thereof in vacation may make such order relative to the notice which shall be given as shall be, by such court or judge, deemed reasonable; and such notice having been given according to the order and duly proved, the court may proceed to a hearing of the cause at the first term or session or afterwards, as it shall judge proper, and any executor or administrator who may be appointed or qualified pending such proceedings, or any other person claiming as widow or heir of such deceased person may appear and defend in such action; *and all creditors and representatives of such deceased person shall be forever concluded by the judgment or decree rendered therein.*

DISTRICT OF COLUMBIA.

30 U. S. STATUTES AT LARGE.

[Chapter 459.]

AN ACT to quiet land titles in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that in all cases when the title or claim of any person out of possession of any real estate in the District of Columbia shall be barred by adverse possession, and the title thereto has vested in the party in possession or the party under whom he claims, the party holding a title which has vested by adverse possession may file a bill in equity in the Supreme Court of the District of Columbia, to have his title thereto perfected; and it shall be sufficient for him to state in his petition that he holds the title to such real estate and that the same has vested in him, or those under whom he claims, by adverse possession. And in such action it shall not be necessary to make any person a party defendant, except such persons as may appear to have a claim or title adverse to that of the plaintiff. And upon the trial of such cause proof of the facts showing a title in the plaintiff by adverse possession shall entitle him to a decree of the court declaring his title by adverse possession, and a copy of such decree may be entered of record in the office of the recorder of deeds for said district. And in any such action, service or process may be had, as provided in sections 787, 788 and 789 of the Revised Statutes, relating to the District of Columbia. And if in any case an adverse claimant shall be dead, then the heirs, devisees, or alienees of such person, or those claiming by, through, or under him, if known, shall be made defendants as adverse claimants, and if they be unknown to the plaintiff, then he shall allege in his petition, under oath, that there are, or he verily believes that there are, persons interested in the subject matter of the petition as heirs or

devisees of the deceased, or as claiming by, through, or under him or them, whose names he cannot insert therein because they are unknown to him, and shall describe the interest of such persons and how derived, so far as his knowledge extends, and service of process on such unknown persons shall be had by designating them in the published notice as the unknown heirs, devisees, or alienees of the last known owner or claimant of the title; and when such service shall be had a decree shall be rendered the same as though personal service had been had: *Provided*, the rights of infants, or others under legal disability shall be saved for a period of two years after the removal of their disabilities: *Provided, however*, that the entire period during which such rights shall be preserved shall not exceed twenty-two years from the time such rights accrued either in said claimant or in the person or persons under whom he claims.

FLORIDA.

Revised Statutes.

* Sect. 1493. *Form and Contents of the Bill.* — Such bill must be sworn to by one or more of the complainants and shall set forth a description of the lands or premises of which partition is prayed, by metes and bounds or other sufficient description, and shall state according to the best of the knowledge and belief of the complainants the names and places of residence of the several owners, joint tenants, tenants in common, or coparceners or other persons interested in said lands or real estate, the quantity or proportionate share held by each and such other matters, if any, as may be necessary to enable the court to adjudicate fully upon the rights and interests of the parties. But if the names, residence, quantity of interest or proportionate share of any of the owners or claimants of such lands are *unknown* to the complainants then it shall be so stated in such bill and such suit may proceed in the same manner *as though such unknown persons or defendants were named in the bill.*

* Sect. 1495. 3. *Exceptions to Report, and Final Decree.* — Any party in interest may file objections or exceptions to the report of the commissioners within ten days after he shall be notified of the filing of the same; or if he be absent from the state so that notice cannot be given, within thirty days after the same is filed; if no objections or exceptions are filed as aforesaid, or if the court is satisfied, upon the hearing of any such objections or exceptions, that they are not well founded, then the report shall be confirmed, and a final decree shall be entered up *which shall accordingly vest in the respective parties the title to the several parcels or portions of the premises* allotted to them respectively, and shall

* Concerning partition proceedings.

give to each of them the possession of and quiet title to their respective shares, *as against the other parties to the suit*, or those claiming through or under them.

GEORGIA.

CODE, 1895.

SECT. 4976. *Service by Publication, when.* — Where any non-resident or person unknown claims or owns title to, or interest, present or contingent, in any real or personal property in this state, service on such non-resident or unknown owner or claimant may be made by publication in cases affecting such property where proceedings are brought —

1. To remove a cloud therefrom or quiet title thereto.

2. To cancel or set aside deeds, mortgages, liens, or incumbrances thereon.

3. To establish, enforce, or foreclose liens thereon.

4. To enforce, by decree for specific performance, any contract in reference thereto.

5. To order the partition thereof by division or sale.

6. To make any decree or order in which the subject of the action is real or personal property in this state, in which a non-resident or unknown person has or may have or claims an interest, actual or contingent, and in which the relief demanded consists wholly or in part in excluding him from an interest therein.

7. Where a non-resident or person unknown has or may have or may claim present, future, or contingent interests in any property in this state.

8. And in all cases in which such person may have or claim any interest in any trust estate in this state, and it becomes necessary or proper or advantageous to order a sale of the whole or any part of such property, service upon such non-resident or unknown person may be perfected by publication.

SECT. 4893. *Removing Cloud on Title.* — An instrument which, by itself or in connection with proof of possession by a former occupant, or other extrinsic facts, gives the claimant thereunder an apparent right in or to the property, may constitute a cloud on the title of the true owner, and the latter may proceed to have the same removed upon proof —

1. That he cannot immediately or effectually maintain or protect his rights by any other course or proceeding open to him.

2. That the instrument sought to be cancelled is such as would operate to throw a cloud or suspicion upon his title, and might be vexatiously or injuriously used against him.

3. That he either suffers some present injury by reason of the hostile claim of right, or, though such claim be not asserted adversely or aggressively, he has reason to apprehend that the evidence upon which he relies to impeach or invalidate the same as a claim upon his title may be lost or impaired by lapse of time.

* Sect. 3577. *Duty of Ordinary, Claims.* — The escheator, so soon as he shall obtain possession of the estate as administrator, shall make known to the ordinary of the county the fact that the same has apparently escheated to the state, whereupon the said ordinary shall pass an order requiring the said administrator to advertise, by publication in one or more papers in this and other states, according to the circumstances of each case, notifying *all persons interested as next of kin of such deceased person*, of the facts and date of his death, the amount of the estate, and the pendency of proceedings to escheat the same, which publication shall be continued for six months. If no person shall appear and claim, as heir, within twelve months from the date of the first publication, the ordinary shall pass an order declaring that said property escheated to the state. If any person claims the property alleged to be escheated, the claim shall be interposed and tried as claims at administrators' sales.

IDAHO.

Revised Statutes, 1887.

† Sect. 4561. The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any one of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory device, or the remainder be a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.

† Sect. 4564. The summons must be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment, or otherwise upon the property, or upon any particular portion thereof; *and generally, to all persons unknown, who have or claim any interest in the property.*

† Sect. 4565. If a party having a share or interest is unknown,

---

* Relating to proceedings to establish an escheat.

† Relating to partition proceedings.

or any one of the known parties reside out of the territory, or cannot be found therein, and such fact is made to appear by affidavit, *the summons may be served on such absent or unknown party by publication*, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action.

* Sect. 4574. The court may confirm, change, modify or set aside the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or of any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life;

2. On all persons interested in the property, *who may be unknown, to whom notice has been given of the action for partition by publication.*

3. On all other persons claiming from such parties or persons or either of them. And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns of such decedent, as if it had been entered before his death.

* Sect. 4595. The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action, and *against all such parties and persons as were unknown, if the summons were served by publication*, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action.

ILLINOIS.

2 Starr & Curtiss, page 1469.

Par. 18. *Heir or Next Freeholder to assign Dower.* — It shall be the duty of the heir at law, or other person having the next

* Relating to partition proceedings.

estate of inheritance or freehold in any lands or estate of which any person is entitled to dower, to lay off and assign such dower as soon as practicable after the death of the husband or wife of such person.

PAR. 19. *If Assignment not made within Month, Suit.* — If such heir or other person shall not, within one month next after such death, satisfactorily assign and set over to the surviving husband or wife, dower in and to all lands, tenements and hereditaments whereof by law he or she is or may be dowable, such survivor may sue for and recover the same by petition in chancery, as hereinafter prescribed, against such heir or other person, or any tenant in possession, or any other person claiming right or possession in said estate.

2 STARR & CURTISS, PAGE 1470.

PAR. 20. *Venue; Court.* — The petition may be filed in any court of record of competent jurisdiction in the county where the estate or some part thereof is situated.

PAR. 22. *Petition; Contents.* — The petition shall set forth the nature of the claim, and particularly specify the premises in which dower is claimed, and shall set forth the interests of all parties interested therein so far as the same are known to the petitioner, and shall pray for the assignment of such dower.

PAR. 23. *Petition; Occupants and All Interested to be Parties.* — Every person having any interest in the premises, whether in possession or otherwise, and who is not a petitioner, shall be made a defendant to such petition.

PAR. 24. *Unknown Owners; Unknown Interests.* — When there are any persons interested in the premises whose names are unknown, or the share or quantity of interest of any of the parties is unknown to the petitioner, or where such share or interest shall be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be contingent, so that such parties cannot be named, the same shall be so stated in the petition.

PAR. 25. *Description of Unknown Defendants.* — All persons interested in the premises in which dower is claimed, whose names are unknown, may be made parties to such petition *by the name and description of unknown owners of the premises, or as the unknown heirs of any person who may have been interested in the same.*

PAR. 27. *Notice by Publication as in Chancery.* — Unknown owners, or parties in interest, of the premises, and the unknown heirs of any such persons, may be notified by advertisement as in cases in chancery.

PAR. 34. *Decree; Commissioners; Their Oath.* — When the court adjudges that the one entitled thereto recover dower, it shall be so entered of record, together with a description of the land out of which he or she is to be so endowed, and the court shall thereupon appoint three commissioners not connected with any of the parties either by consanguinity or affinity, and entirely disinterested, each of whom shall take the following oath: . . .

PAR. 35. *Division by Commissioners.* — The commissioners shall go upon the premises, and if the same are susceptible of division, without manifest prejudice to the parties in interest, shall set off and allot to the person entitled thereto his or her dower, by metes and bounds, according to quality and quantity, of all the premises described in the order of the court.

PAR. 38. *Report; Approval by Court; Effect; Possession.* — The commissioners shall make report in writing, signed by at least two of them, showing what they have done, and if they have made a division, describing the premises alloted by metes and bounds or other proper description; *and the allotment* so made, if approved by the court, *shall vest in the person entitled thereto an estate in the lands* and tenements *set off* and alloted *to him* or her for and *during his or her natural life;* and the court shall forthwith cause such persons to have possession by writ directed to the sheriff for that purpose.

1 STARR & CURTISS, PAGE 563.

PAR. 7. *Unknown Parties; Affidavit; Notice.* — In all suits in chancery, and suits to obtain title to lands, in any of the courts of this state, *if there be persons interested in the same, whose names are unknown,* it shall be lawful to make such persons parties to such suits or proceedings, *by the name and description of unknown owners, or unknown heirs or devisees of any deceased person, who may have been interested in the subject matter of the suit previous to his or her death;* but in all such cases an affidavit shall be filed by the party desiring to make any unknown person a party, stating that the names of such persons are unknown; and process shall be issued against all parties, by the name and description given as aforesaid; *and notices given by publication,* as is required in this act, *shall be sufficient to authorize the court to hear and determine the suit, as though all parties had been sued by their proper names.*

1 STARR & CURTISS, PAGE 590.

PAR. 43. *Unknown Parties.* — All decrees, orders, judgments and proceedings, made or had with respect to unknown persons, shall have the same effect, and be as binding and conclusive upon them, as though such suit or proceeding had been instituted against them by their proper names.

3 STARR & CURTISS, PAGE 2917.*

*PAR. 7. *Unknown Owners; Contingent Interests.* — When there are any persons interested in the premises whose names are unknown, or the share or quantity of interest of any of the parties is unknown to the petitioner, or where such share or interest shall be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be contingent, so that such parties cannot be named, the same shall be so stated in the petition.

PAR. 8. *Unknown Owners; how described.* — All persons interested in the premises of which partition is sought to be made according to the provisions of this chapter, whose names are unknown, may be made parties to such petition *by the name and description of unknown owners of the premises, or as the unknown heirs of any person who may have been interested in the same.*

PAR. 9. *Service as in Chancery.* — The defendants to any such petition shall be summoned in the same manner as defendants in suits in chancery.

PAR. 10. *Notice to Unknown Owners.* — Unknown owners, or parties in interest, of the premises, and the unknown heirs of any such persons, may be notified by advertisement as in cases in chancery.

3 STARR & CURTISS, PAGE 2924.

PAR. 35. *When Owner Unknown.* — If the person entitled to any such estate is unknown, the court may determine whether the estate shall be sold or not, as in case of persons under disability, and in the event of sale, make such order for the protection of the rights of such person, in the same manner, as far as may be, as if the persons were unknown and had appeared.

INDIANA.

REVISION OF 1894.

SECT. 320. *Notice by Publication.* — The clerk, by order of the court, if in session, or in vacation without such order, shall cause a notice of the pendency of any action, and the term at which the same will stand for trial, to be published for three weeks successively, in some newspaper of general circulation, named by the plaintiff or his attorney, printed in the English language and published in the county (or if none be printed or published therein, then in the county in this state nearest thereto in which any such

* Relating to partition proceedings.

paper may be printed), in either of the following cases shown by affidavit: —

Fourth: Where the residence of any defendant, upon diligent inquiry, is unknown.

Fifth: Where the name of any defendant is unknown, and he is believed to be a non-resident.

Sect. 2491. *Requisites of Petition; Parties.* — Such petition shall be entitled with the names of the parties, petitioner and defendants, and the court in which pending. If the deceased died intestate, his widow, if any, and his other heirs, shall be made defendants; if he died testate, his widow, if any, and his devisees, shall be made defendants, provided that if he died intestate as to any portion of his real estate, his heirs shall also be made defendants. The holder of every lien on the real estate which the executor or administrator shall have reason to deem invalid or discharged, in whole or in part (except taxes and judgments and mortgages in favor of the state of Indiana), shall be made defendants to every such petition, and may be proceeded against by the name or style by which he or they may be designated in the record or instrument constituting such lien. Any person claiming an interest in or lien upon any of the real estate may also be made a defendant. If the names of any of the heirs or devisees of the deceased be unknown to the petitioner, such fact shall be stated in the petition, *and they may be proceeded against as the unknown heirs or devisees of the deceased.* The petition shall set forth a description of the real estate of the deceased liable to be made assets for the payment of his debts; the title of the decedent therein at his death, and the probable value thereof, exclusive of liens; the amount of the personal estate of the decedent which has come to the possession or knowledge of the executor or administrator; the amount of the claims filed and allowed against the estate; the amount of claims filed and pending against the estate; the particulars of each lien, whether general or special, including taxes accrued at the death of the decedent, and judgments and mortgages, due or owing to the state, upon all or any of the decedent's real estate, appearing and remaining unsatisfied of record, with the amount and date of lien and names of the holders, as the same appears of record. If the decedent shall have died testate, and his will shall contain any provision for the disposition of his estate for the payment different from the manner which the law prescribed in case of intestacy, such provision shall be set forth in the petition. Such petition shall be verified by the oath of the executor or administrator filing the same.

Sect. 2494. *Notice of Petition.* — Whenever any executor or

administrator of any decedent's estate shall have filed in the proper court a petition for the purpose of procuring an order for the sale of real estate, for the purpose of paying the debts of such decedent's estate, that notice of the pendency of the petition and of the time and place of hearing the same shall be served upon the defendants personally at least ten days before the time set for hearing the same, unless it appear from the petition or affidavit filed therewith that the names of the residences of any of them are unknown, or that any of them are non-residents of this state, in which case such notice shall be given by publication for three weeks successively in some public newspaper published in the county in which the administration of the estate is pending, if any be published therein, and if not then in some public newspaper published nearest thereto in this state, at least ten days before the time set for hearing the said petition. The notices herein provided for shall be issued by the clerk of the court, and attested by his signature and the seal of the court.

IOWA.

Code, 1897.

Sect. 3538. *Unknown Defendants.* — Where it is necessary to make an unknown person defendant, the petition shall be sworn to, and state what interest such person has or claims to have, how the same was derived or is claimed to have been derived, as definitely as may be, that the name and residence of such person is unknown to plaintiff, and that he had sought diligently to learn the same; thereupon the court or judge thereof shall approve a notice collected from the averments of the petition, which shall contain the name of the plaintiff, a description of the property, and all the allegations of the petition concerning the interest of the unknown person, and the mode of devolution thereof, the relief demanded, the name of the court, and the term at which appearance must be made. Such notice must be entitled in the full name of the plaintiff *against the unknown claimants of the property*, and shall be signed by the plaintiff or his attorney.

Sect. 4228. *When allowed.* — When one or more owners of land, the corners and boundaries of which are lost, destroyed or in dispute, desire to have the same established, they may bring an action in the district court of the county where such loss, destroyed or disputed corners or boundaries, or part thereof, are situated, against the owners of the other tracts which will be affected by the determination or establishment thereof, to have such corners or boundaries ascertained and permanently established. If any pub-

lic road is likely to be affected thereby, the property county shall be made defendant.

SECT. 4229. *Notice.* — Notice of such action shall be given as in other cases, and if the defendants or any of them are non-residents of the state, or unknown, they may be served by publication as is provided by law.

SECT. 4236. *Corners and Boundaries established.* — The corners and boundaries finally established by the court in such proceeding, or on appeal therefrom, shall be binding upon the parties as the corners or boundaries which had been lost, destroyed or in dispute, but if it is found that the boundaries and corners alleged to have been recognized and acquiesced in for ten years have been so recognized and acquiesced in, such recognized boundaries and corners shall be permanently established.

MAINE.

REVISED STATUTES.

[1883, chapter 88.]

* SECT. 22. Such judgment is conclusive on all rights of property and possession of all parties and privies to the judgment, including all persons who might have appeared and answered, except as hereinafter provided.

[Freeman's Supplement, page 464; Laws of 1895, chapter 85.]

SECT. 49. A person in possession of real property, having either by himself or those under whom he claims been in uninterrupted possession thereof, for ten years or more, claiming an estate of freehold therein, may file a petition in the Supreme Judicial Court setting forth his estate, stating the source of his title, describing the premises and averring that an apprehension exists that persons named in the petition, *or persons unknown* claiming as heirs, devisees or assigns *or in any other way*, by, through, or under a person or persons named in the petition, claim some right, title or interest in the premises adverse to his said estate; and that such apprehension creates a cloud upon the title and depreciates the market value of his property; and praying that such persons be summoned to show cause why they should not bring an action to try their title to the described premises. If any such supposed claimants are unknown, the petitioner or his attorney shall so allege under oath, but the truth of the allegation shall not after decree filed be denied, for the purpose of defeating the title established

* Relating to partition proceedings.

thereby. Upon such petition the court shall order notice returnable at a term of the supreme judicial court to be held in the county where the real estate described lies. Personal service by copy of the petition and order of notice, shall be made upon all such supposed claimants residing in the state, fourteen days before the return day; and upon all such supposed claimants residing out of the state, service may be made by personal service of copy of the petition and order of notice; by publication for such length of time, in such newspapers or by posting in such public places as the court may direct; or in any or all of these ways at the discretion of the court. If any claimants appear to answer to said petition the procedure shall be the same as is provided by section forty-eight; and if the court upon hearing, finds that the allegations of the petition are true and that notice by publication has been given as ordered, it shall make and enter a decree that all persons named in the petition *and all persons alleged to be unknown, claiming by, through or under persons so named*, and who have not so appeared, *shall be forever debarred and estopped from having or claiming any right or title adverse to the petitioner in the premises described* in the petition; which decree shall within thirty days after it is finally granted be recorded in the registry of deeds for the county where the land lies, and shall be effectual to bar all right, title and interest of all persons whether adults or minors, upon whom notice has been served, personally *or by publication*, as herein provided. The court may in its discretion appoint agents or guardians ad litem, to represent minors or other supposed claimants.

[1895, chapter 80, page 449.]

SECT. 1. When the record title of real estate is encumbered by an undischarged mortgage, and the mortgagor and those having his estate in the premises have been in uninterrupted possession of such real estate for twenty years after the expiration of the time limited in the mortgage for the full performance of the conditions thereof; he or they, or any person having a freehold estate, vested or contingent in possession, reversion or remainder, in the land originally subject to the mortgage or in any undivided or any aliquot part thereof, or any interest therein which may eventually become a freehold estate, or any person who has conveyed such land or any such interest therein with covenants of title or warranty, may apply to the supreme judicial court by petition, setting forth the facts, and asking for a decree as hereinafter provided; and if *after notice to all persons interested* as provided in section four, no evidence is offered of any payment within said twenty years or of any other act within said time, in recognition

of its existence as a valid mortgage, the court upon hearing may enter a decree setting forth such facts and its findings in relation thereto, which decree shall within thirty days be recorded in the proper registry of deeds and thereafter no action at law or proceeding in equity shall be brought by any person to enforce a title under said mortgage.

SECT. 3. When the mortgagor of such an undischarged mortgage and those having his estate in the premises have been in uninterrupted possession of such real estate for twenty years from the date thereof, and it shall appear that such mortgage was not given to secure the payment of a sum of money or a debt, but to secure the mortgagee against some contingent liability assumed or undertaken by him, and that such conditional liability has ceased to exist and that the interests of no person will be prejudiced by the discharge of such mortgage, the mortgagor or those having his estate in the premises, or any of the persons to whom a similar remedy is granted in section one of this act may apply to the supreme judicial court by petition setting forth the facts and asking for a decree as hereinafter provided; and if *after notice to all persons interested* as provided in section four, and upon hearing it shall appear that the liability on account of which such mortgage was given has ceased to exist and that such mortgage ought to be discharged, the court may enter a decree setting forth the facts proved and its findings in relation thereto, which decree shall within thirty days be recorded in the proper registry of deeds and thereafter no action or proceeding in equity shall be brought to enforce a title under said mortgage.

SECT. 4. When it is alleged under oath in the petition that the mortgagees or persons claiming under them are unknown or that their names are unknown, *they may be described generally as claiming by, through or under some person or persons named in the petition* Personal service by copy of the petition and order of notice shall be made upon all such respondents residing in the state fourteen days before the return day; and upon all such respondents residing out of the state, service may be made by personal service of copy of the petition and order of notice; by publication for such length of time, in such newspapers or by posting in such public places as the court may direct; or in any or all of these ways at the discretion of the court.

SECT. 5. Upon the service of such notice in accordance with the order of the court, the court shall have jurisdiction of all persons made respondents in the manner above provided, and shall upon due hearing make such decree upon the petition and as to costs as it shall deem proper.

SECT. 6. The decree of the court, determining the validity, nature or extent of any such incumbrance shall be effectual to bar all the respondents from any claim thereunder contrary to such determination, and such decree so barring said respondents shall have the same force and effect as a release of such claims, executed by the respondents in due form of law. The court may, in its discretion, appoint agents or guardians ad litem to represent minors or other respondents.

MARYLAND.

PUBLIC GENERAL LAWS, 1888.

[Article 16.]

SECT. 111. In cases where it is unknown whether such party be living or dead, the bill may be filed against him as if living; and in cases where the party is dead, and it is unknown whether he left any heirs, or if the heirs be unknown, then the bill may describe such unknown heirs as the heirs of the person who, if living, would be the proper party.

SECT. 112. Where it is unknown whether a deceased person who ought to be a party to a bill in chancery, has left any heirs, or if the heirs be unknown, in all such cases, *the bill may describe such unknown persons as the heirs of the person who, if living, would be the proper party;* and the court shall order notice by publication to be given to such persons, according to their description in the bill, and the same proceedings shall be had against them as are had against non-resident defendants named in a bill in chancery; and any decree which may be passed, shall have the same effect against those described as the heirs of a particular person, as if the party whose heirs they are supposed to be were living and a party to such decree; the provisions of this section to apply to all cases, including bills of review, bills of interpleader and supplemental bills.

SECT. 113. Any non-resident, or person proceeded against as a non-resident, may appear and answer before final decree, on such reasonable terms as the court may prescribe.

SECT. 114. In all suits in chancery against non-residents or against persons who may be proceeded against as if they were non-residents, the court may order notice to be given by publication in one or more newspapers, stating the substance and object of the bill or petition, and warning such party to appear on or before the day fixed in such order, and show cause why the relief prayed should not be granted; and such notice shall be published as the court may direct, not less, however, than once a week for four

successive weeks, fifteen days before the day fixed by such order for the appearance of the party.

SECT. 115. Upon application for a renewal of a lease containing a covenant for renewal, where any person or persons interested in the reversion reserved in said lease, and who should be the party or parties to the proceedings, is or are unknown, *it shall be sufficient to* substantially *describe such unknown person* or persons in the bill *as the unknown person or persons interested in said reversion, by, through or under the original lessor or lessors*, naming him or them; and the court shall order notice by publication to be given to such unknown person or persons, according to his or their description in the bill, and the same proceedings shall be had against such unknown person or persons as are had against non-resident defendants named in a bill in chancery; and any decree which may be passed shall have the same effect against such unknown person or persons, whether claiming by descent, purchase or in any other manner, and against his or their heirs, executors or administrators and assigns, as if such unknown person or persons had been made a defendant or defendants by name in said bill.

MASSACHUSETTS.

ST. 1885, c. 283.

When the record title of real estate is encumbered by an undischarged mortgage, and the mortgagor and those having his estate in the premises have been in uninterrupted possession of such real estate for twenty years from the date thereof, and it shall appear that such mortgage was not given to secure the payment of a sum of money or a debt, but to secure the mortgagee against some contingent liability assumed or undertaken by him, and that such contingent liability has ceased to exist and that the interests of no person will be prejudiced by the discharge of such mortgage, the mortgagor, or those having his estate in the premises, may apply to the supreme judicial court by petition, setting forth the facts and asking for a decree as hereinafter provided; and if after notice to all persons interested, by publication or otherwise as the court may order, it shall appear that the liability on account of which such mortgage was given has ceased to exist, and that such mortgage ought to be discharged, the court may enter a decree, setting forth the facts proved, and its findings in relation thereto, which decree shall within thirty days be recorded in the proper registry of deeds, and thereafter no action shall be brought to enforce a title under said mortgage.

St. 1889, c. 442.

Sect. 1. When the title to land appears of record to be affected by a possible condition, restriction, reservation, stipulation or agreement made or imposed more than thirty years prior to the commencement of the proceedings hereinafter provided for, any person having a freehold estate, vested or contingent, in possession, reversion or remainder, in said land, or in any undivided or any aliquot part thereof, or any interest therein which may eventually become a freehold estate, and any person who has conveyed such estate or any such interest therein with covenants of title or warranty, may file a petition in the supreme judicial court for the purpose of determining the validity or defining the nature and extent of such possible condition, or other encumbrance, against any person who might be entitled in any event to claim to set up the same or to enforce or avail himself thereof. Two or more such defects of the same general character in a title to the same parcel of land or to different portions of the same parcel of land may be set forth in the same petition and in case of a contest the court shall make such order for separate issues as may be proper.

Sect. 2. When it is averred in the petition that there are necessary or proper respondents whose names are unknown to the petitioner, proceedings may be had against such respondents by a general description of them, as the heirs or devisees of the person deceased, as persons claiming under certain persons named or described as the owners of certain lands or otherwise. When the precise name of any respondent cannot be ascertained, he may be described as accurately as practicable; and when it is averred that there are classes of necessary or proper respondents whom it is impracticable and unnecessary to name and to have served with process individually such respondents may be proceeded against by general description. The court may, by amendment, in any case when in its opinion the petitioner can and should do so, require him to name or describe respondents more particularly. The foregoing facts shall be set forth on oath in the petition.

Sect. 3. Such notice shall be given to non-resident respondents, to respondents whose residences are unknown, to unknown or unnamed respondents and to any other respondents upon whom for any reason service cannot be made under existing provisions of law as the court shall deem proper. If there are respondents to be affected by a decree of the court, who appear not to have had actual notice of the petition, the court shall appoint some disinterested party to act as agent for them.

SECT. 4. Upon the service of such notice in accordance with the order of the court, the court shall have jurisdiction of all persons made respondents to the petition in the manner above provided, and shall upon due hearing make such decree upon the petition and as to costs as it shall deem proper.

SECT. 5. The decree of the court, determining the validity, nature or extent of any such possible condition or other encumbrance shall be effectual to exclude all the respondents from any claim thereunder contrary to such determination, and the decree of the court, excluding respondents from any claim thereunder, shall have the same force and effect as a release of such claims executed by the respondents in due form of law.

ST. 1893, c. 340.

SECT. 1. When the record title of real property is clouded by an adverse claim, or by the possibility of such claim, any person in possession of such real estate claiming an estate of freehold therein or an unexpired term of not less than ten years, and any person, who, by force of the covenants in any deed or otherwise, may be liable to damages if such claim should be sustained, may file a petition in the supreme judicial court setting forth his interest, describing the premises, the claims and the possible adverse claimants so far as known to him and praying that such claimants may be summoned to show cause why they should not bring an action to try such claim. Where no better description can be given a general description, as the heirs of A. B., or the like, shall suffice. A person who is in the enjoyment of an easement shall be held to be in possession of real property, within the meaning and for the purposes of this section.

SECT. 2. Upon such petition the court shall order notice to be given by publication to the supposed claimants, whether residents or non-residents of this Commonwealth, which notice shall bind all the world, but the court may also require personal or other notice, and if, upon return of the order of notice duly executed, the parties notified do not appear within the time limited, or having appeared, disobey the lawful order of the court to try their claim, the court shall enter a decree that they be forever debarred and estopped from having or enforcing any such claim adversely to the petitioner, or his heirs and assigns, in the premises described.

SECT. 3. Two or more persons owning separate and distinct parcels of land in the same county and holding under the same source of title, may join in a petition against the same supposed claimants, as may also persons owning separate and distinct interests in the same parcel or parcels. If the petitioner prefers, and the supposed claimants are residents of this Commonwealth,

the petition may be inserted like a declaration in a writ, and served by a copy, like a writ of original summons. If the persons notified or summoned appear and disclaim all right and title adverse to the petitioner they shall recover their costs. If they claim title they shall by answer show why they should not be required to bring a suit and try such title; and the court shall make such decree respecting the bringing and prosecuting of such suit as may seem equitable and just. When any judgment or decree shall be rendered for a conveyance, release or acquittance in any court of this Commonwealth, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect and be available as if the conveyance, release or acquittance had been executed conformably to such judgment or decree, subject to the provisions of the fourth section.

Sect. 4. A party against whom a judgment or decree has been rendered hereunder without other service than by publication in a newspaper and whose right is barred by such judgment or decree, shall have a right as against the party or parties in whose favor such judgment or decree was entered, or their heirs or devisees, to recover the value at the time he may bring suit, excepting any improvements of any interest or right of which he may have been deprived by such judgment or decree: *provided*, he might but for such judgment or decree have been able under the statute of limitations then in force to maintain at the date of bringing such suit an action for the recovery of such interest or the enforcement of such right. The court if, because of substantial reasons existing for believing that there are bona fide claimants in existence or for other special cause, it deems justice so demands, may in its judgment or decree require the giving of a bond to respond to any such suit brought within five years from such judgment or decree.

Sect. 5. Chapter one hundred and seventy-six of the Public Statutes is hereby repealed.

Sect. 6. This act shall not affect any proceeding begun under said chapter one hundred and seventy-six prior to the taking effect of this act.

Sect. 7. This act shall not apply to any property, right, title or interest of the Commonwealth.

St. 1897, c. 522.

Sect. 1 (*as amended by St. 1898, c. 457, and St. 1899, c. 444*). In any suit in equity brought in the supreme judicial court or in the superior court, in order to quiet or establish the title to real

estate situated within this Commonwealth, or to remove a cloud from the title to such real estate, in which suit is sought to determine the claims or rights of any person or persons who are unascertained, not in being, unknown, or out of the Commonwealth, or who for any reason cannot be actually served with process and made personally amenable to the decree of the court, such person or persons may be made parties defendant, and if they are unascertained, not in being, or unknown, general words of description, such as the heirs or legal representatives of A B, or such persons as shall become heirs, devisees or appointees of C D, a living person or persons claiming under A B, shall suffice. It shall not be necessary for the maintenance of such suit that the parties defendant shall have a claim or the possibility of a claim resting upon an instrument the cancellation or surrender of which would afford the relief desired; but it shall be sufficient that the parties defendant claim or may claim by purchase, descent or otherwise, some right, title, interest or estate in the land which is the subject of the suit which claim cannot be met by the plaintiffs without the production of evidence or which claim depends upon the construction of a written instrument. Two or more persons claiming to own separate and distinct parcels of land in the same county by titles derived from a common source may join as parties plaintiff in any suit brought under this act.

SECT. 2. If in any such suit it shall appear that there is, or may be, any person who has been made a party defendant under the preceding section, on whom actual service cannot be or has not been made, the court at the request of the plaintiff may order notice of the suit, in such form as it may direct, to be posted in a conspicuous place on the premises, and may also order a general notice to be published in such newspaper or newspapers within or without the Commonwealth, or both, or in such other manner as the court considers most effectual and may also, in its discretion, require personal notice to be given to any party who can be reached thereby, and notice given in accordance with this section shall be deemed constructive service on all parties defendant whether they can be actually served with process or not.

SECT. 3. If after notice has been given or served as provided in section two, and the time limited in such notice for the appearance of parties defendant has expired it shall appear to the court that there are or may be parties defendant who have not been actually served with process within the Commonwealth and who have not appeared in the suit, the court may of its own motion or on the representation of any party appoint a suitable person to appear and act as guardian ad litem or next friend of any such party or parties defendant, and if there are or may be any such

parties defendant who have conflicting interests the court may appoint different guardians ad litem or next friends to represent them.

SECT. 4. The cost of appearance of any such guardian ad litem or next friend, including the compensation of his council, shall be determined by the court and paid by the plaintiff, and execution against the plaintiff may issue therefor in the name of the guardian ad litem or next friend.

SECT. 5. After all parties defendant have been either served with process or notified as provided in section two, and after the appointment of a guardian ad litem or next friend, if any such appointment shall be deemed necessary or proper, as provided in section three, the court in which such suit is pending may proceed therein as though all the parties defendant had been actually served with process. Such suit shall be deemed to be a proceeding in rem against the land, and a decree establishing or declaring the validity, nature or extent of the plaintiff's title may be entered, which decree shall operate directly on the land and shall have the force of a release made by or on behalf of all parties defendant of all claims inconsistent with the title established or declared thereby. But nothing herein contained shall prevent the court from also exercising its ordinary jurisdiction *in personam* against parties defendant who have actually been served with process and who are personally amenable to its decrees.

MICHIGAN.

HOWELL'S ANNOTATED STATUTES, 1882

* SECT. 7860. If any parties having an interest in such lands are unknown, or if either of the known parties reside out of this state, or cannot be found therein, and such facts be made to appear to the court by affidavit, an order may be made by the court containing a sufficient description of the premises whereof partition is sought, and *requiring all parties interested* to appear and answer the bill by a day in such order to be specified, which order shall be served personally, or shall be published once in each week successively in such paper as may be designated in such order, and for such time as the court shall designate, not exceeding three months.

* SECT. 7861. The proof of personal service or of the publication of such order, shall authorize an order of the court for taking the bill as confessed against all such unknown parties, and persons not resident in this state, or not found therein, as shall not appear and answer by the day mentioned in the order, or on such further day as the court may appoint; and all such unknown parties as

* Relating to partition proceedings.

may appear, shall be entitled to be made parties to the suit, and the bill may be amended accordingly.

* SECT. 7880. Upon the confirmation of the report of any commissioners by the court, a decree shall thereupon be entered, that such partition shall be firm and effectual forever, and such decree shall be binding and conclusive.

1. On all parties named therein, and their legal representatives, who shall, at the time, have any interest in the premises divided, as owners in fee, or as tenants for years, or as entitled to the reversion, remainder or inheritance of such premises, after the termination of any particular estate therein; or who, by any contingency contained in any will or grant, or otherwise, may be or become entitled to any beneficial interest in the premises; or who shall have any interest in any undivided share of the premises as tenant for years, for life, by the curtesy, or in dower.

2. On all persons interested in the premises, *who may be unknown*, to whom notice shall have been given by personal service, or by publishing the same as is hereinbefore directed; and,

3. On all other persons claiming from such parties or persons, or either of them.

SECT. 6744. That in all suits and proceedings in chancery, if there be persons interested in the same, as heirs of some person or persons deceased, whose names are unknown, it shall be lawful to make such unknown heirs parties defendant to such suit or proceeding *by the name and description of unknown heirs of such deceased person*. In all such cases an affidavit shall, at the time of the filing of the bill of complaint or petition, be made and filed in the office of the register in chancery of the county wherein said suit or proceeding is brought by the complainant, his agent, or solicitor, stating the name of the deceased person whose heirs are unknown, and that the names of such heirs are unknown to affiant. And if it shall appear to the satisfaction of the court, or the judge thereof, or a circuit court commissioner of the county where said suit or proceeding is brought, that such unknown heirs are necessary or proper parties to the suit or proceeding, an order shall be made by the court judge thereof, or circuit commissioner, as the case may be, for the appearance of such unknown heirs in said suit or proceedings, on or before a future day specified in said order: *Provided, however*, that said day shall not be less than six months from the date of the order.

SECT. 6745. All subsequent proceedings, including publication of said order shall be taken in the same manner and with like effect as though the names of said heirs were known, but they were non-

* Relating to partition proceedings.

residents of this state, and such proceedings shall be in conformity with the statute relating to non-resident defendants: *Provided*, that the rights of infants, insane persons, idiots, married women, or other persons, under legal disability, shall not be affected or concluded by any proceedings under this act until the expiration of seven years after such disability shall have been removed.

Sect. 6746. Any person made a defendant in any proceeding or suit in chancery as an unknown heir, and who desires to appear in said suit or proceeding may, upon filing an affidavit in the office of the register in chancery of the county where said suit is pending that he is one of the heirs of the deceased person named in the bill of complaint, and has an interest in the proceeding or suit, enter an order of course in said suit or proceeding that said suit shall, as far as he is concerned, proceed against him in his proper name as a co-defendant with the remaining unknown heirs, and upon service of a copy of said affidavit, and notice of the entry of said order, upon the complainant or his solicitor, together with notice of the entry of the usual order of appearance, then said cause shall from that time proceed as in all other causes in chancery.

MINNESOTA.

Statutes, 1894.

Sect. 5839. *Proceedings against Unknown Heirs.* — That when the heirs of a deceased person are proper parties defendant to any action relating to real property in this state, and when the names and residences of such heirs are unknown, such heirs may be proceeded against under the name and title of "*the unknown heirs" of the deceased.*

Sect. 5840. *Same; Publication of Summons.* — Upon presenting an affidavit to the court or judge, showing to his satisfaction that the heirs of such deceased person are proper parties to the action, and that their names and residences cannot with use of reasonable diligence be ascertained, such court or judge may grant an order that service of the summons in such action be made on such "*unknown heirs*" by publication thereof in the same manner as in actions against non-resident defendants.

Sect. 5841. *Same; Effect of Judgments and Decrees.* — Any order, judgment or decree made or rendered in any such case shall be valid and binding on such unknown heirs, whether they be of age or minors.

Sect. 5842. *Same; Such Heirs admitted to defend after Judgment; Minors.* — Such heirs may, on application to the court, and on sufficient cause shown, be allowed to defend such action, at any time within one year after the rendition of judgment thereon:

Provided, that if it shall appear that such heirs were minors at the time such judgment was rendered, they may be allowed to defend the action at any time within two years from the day of their becoming of age.

Sect. 5817. *Action to determine Adverse Claims.* — An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein, or lien upon the same, adverse to him, for the purpose of determining such adverse claim, estate, lien or interest; and any person having or claiming title to vacant or unoccupied real estate may bring an action against any person claiming an estate or interest therein adverse to him, for the purpose of determining such adverse claim, and the rights of the parties respectively.

Sect. 5818. *Same; Unknown Parties.* — That, in any action brought to determine any adverse claim, estate, lien, or interest in real property, under section two of chapter seventy-five of the general statutes, A.D. 1878, the plaintiff may include as defendant in such action, and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien, or interest in the lands in controversy, the following, viz.: "*Also all other persons or parties unknown, claiming any right, title, estate, lien or interest in the real estate described in the complaint herein.*" And service of the summons may be had upon all such unknown persons or parties defendant, by publication, as provided by law in case of non-resident defendants. And all such unknown persons or parties so served shall have the same rights as are provided by law in case of all the other defendants upon whom service is made by publication, and the action shall proceed against such unknown persons or parties in the same manner as against the defendants who are named, upon whom service is made by publication, and with like effect; *and any such unknown persons* or parties who have or claim any right, estate, lien or interest in the said property in controversy, at the time of the commencement of the action, duly served as aforesaid, *shall be bound and concluded by the judgment in such case*, if the same is in favor of the plaintiff therein, as effectually as if the action was brought against such defendant by his or her name, and personal service of the summons obtained; *provided, however*, that such judgment shall not bind such unknown persons or parties defendants, unless the plaintiff shall file a notice of *lis pendens* in the office of register of deeds, as provided by law, before commencing the publication of said summons, and a copy of said notice of *lis pendens* be printed and published with said summons, and following next

thereafter in the columns of the newspaper wherein said summons is printed and published.

* SECT. 5771. *Summons, to whom addressed.* — The summons shall be addressed by name to all the owners and lien holders who are known *and generally to all persons unknown, having or claiming an interest in the property.*

MISSISSIPPI.

ANNOTATED CODE (THOMPSON, DILLARD & CAMPBELL).

SECT. 498. *Proceedings to confirm Tax Titles.* — Any person holding or claiming, under a tax title, lands heretofore or hereafter sold for taxes, when the period for redemption has expired, may proceed by bill in the chancery court, to have such title confirmed and quieted, and shall set forth in his bill his claim under the tax sale, and the names and places of residence of all persons interested in the land, so far as known to complainant, or as he can ascertain by diligent inquiry; and where the names of persons in interest or their places of residence are unknown, and have not been ascertained by diligent inquiry, the bill shall so state, and shall in all cases be sworn to; and where the names and places of residence of persons in interest are given, they shall be made parties defendant; and where the bill shall show that the persons interested are unknown to complainant, and that he has made diligent inquiry for their names and could not obtain them, all persons interested may be made defendants by a notice addressed: "*To all persons having or claiming any interest in the following described land, sold for taxes on day of A.D. namely:* (describing land as described in the tax collector's conveyance)"; and the notice shall state the nature of the suit, and require the appearance of all parties in interest on the return day, not to be less than two months from the date of the first publication of notice; and the notice shall be published for three weeks in a public newspaper of the county in which the court is held, if there be one; and where there is no newspaper in the county, the notice shall be posted at the court house door of the county, and published for three weeks in a public newspaper in an adjoining county or at the seat of government of the state. And it shall be lawful in all cases to set forth in the bill the names of all persons interested, as far as ascertained, and make them parties, and also to join and make defendants "*all persons having or claiming any legal or equitable interest in*" *the lands described in the bill.* Such suits shall be proceeded with as other cases; and if the bill be taken for confessed, or if it appear that complainant is entitled to a

* Relating to partition proceedings.

decree, it shall be rendered, confirming the tax title against all persons claiming to hold the lands by title existing at the time of the sale for taxes; *and such decree shall vest in the complainant, without any conveyance by a master or commissioner, a good and perfect title to said lands; and such decree shall*, in all the courts of this state, *be* held as *conclusive evidence that the title to said land was vested* in the complainant, *as against all persons* claiming the same under title existing prior to the sale for taxes.

SECT. 499. *Any Other Title may be confirmed.* — The owner in possession of any land, or the owner thereof who may be out of possession, if there be no adverse occupancy thereof, may file a bill in the chancery court to have his title confirmed and quieted; and the law for notice, process, proceedings, and practice, as provided for confirming and quieting tax titles shall apply, no matter by what tenure the complainant may hold; and unknown and non-resident parties may be made defendants as they are made defendants to proceedings to confirm tax titles. If on the final hearing of any such suit the court shall be satisfied that the complainant is the real owner of the land, it shall so adjudge, *and its decree shall be conclusive evidence* of title as determined from the date of the decree *as against all parties defendant.*

SECT. 3421. *Non-resident and Unknown Defendants summoned by Publication.* — If a defendant in any proceeding in a chancery court be shown by bill or petition sworn to or by affidavit filed, to be a non-resident of this state, or not to be found therein on diligent inquiry, and the post office of such defendant be stated in the bill, petition or affidavit, or it be therein stated that it is not known to the complainant or petitioner, or, if the affidavit be made by another for him, that such post office is unknown to the affiant, and he believes it is unknown to the complainant or petitioner, the clerk, upon the filing of the bill or petition, account, or other commencement of a proceeding, shall prepare and publish a summons to such party to appear and defend the suit on a rule day or on the first day of a term of the court, sufficiently distant in time to admit of the due publication thereof. The summons shall be in the form following, to wit:

"State of Mississippi.

To (the defendant)

You are commanded to appear before the chancery court of the county of , in said state, on the Monday of A.D. to defend the suit in said court of (and others), wherein you are a defendant. This day of A.D.

Clerk."

Upon proof of publication of such summons for three weeks in some newspaper published in the county, or in a convenient county, or at the seat of government of this state, and of the mailing of a copy of the summons to the defendant at his post office, where that is stated, the defendant may be thereafter proceeded against as if he had been personally served with a summons in the case in this state.

SECT. 3424. *Unknown Heirs and Unknown Defendants.* — When unknown heirs are made parties defendant in any proceeding in the chancery court, upon affidavit that the names of such heirs are unknown, the complainant may have publication of summons for them, and such proceedings shall be had thereupon in all respects as are authorized in the case of non-resident defendants; and when the parties in interest are unknown, and an affidavit of that fact be filed, they may be made parties by publication to them *as unknown parties in interest.*

SECT. 518. *How Unknown Persons may be made Parties.* — When the heirs of a deceased person shall be necessary or proper parties to any suit or proceeding in chancery, and the names of all or any such heirs shall be unknown to the complainant, such of said persons whose names may be unknown, may be described as the "*unknown heirs*" *of the deceased;* and when the parties in interest are unknown they may sued as "*unknown parties in interest.*"

SECT. 1703. *Proceedings to establish Escheats.* — In all cases when property may have escheated to the state, it shall be the duty of the escheator of the county in which said property may be to file in the chancery court a bill in the name of the state to have the escheat judicially declared; the bill shall contain a statement of the name of the last owner, and that he died without heirs, the names of all persons who claim an interest in the property, if any be known, and also a description of the property and who, if any one is in possession, and an averment that the same has escheated to the state for want of heirs.

SECT. 1704. *What Persons summoned; Publication made.* — On the filing of the bill, the clerk shall issue a summons to all persons residing in this state and named in the bill as having or claiming an interest in the property, and also to the person named as being in possession, to appear and answer the same; and he shall give notice, by publication as in other cases, *to all parties, known or unknown, having or claiming an interest in the property,* to appear and answer the bill; which notice shall contain a description of the property, and the name, residence, and place of death of the last owner, if known.

SECT. 1705. *A Claimant not a Party may answer.* — Any person who claims an estate or interest in property, against which proceedings have been instituted to have an escheat judicially declared, though not named in the bill or summoned, may, nevertheless, appear and answer the bill, interposing his title or claim, but shall not recover costs unless it appear that he has some estate or interest in the property, even though the state fail in establishing an escheat.

SECT. 1706. *Proceedings in Court.* — The proceedings shall be conducted as other suits in the chancery court; and, if determined in favor of the state, the court shall decree the property escheated to the state, and thereby the state shall be seized and possessed of the property in law and in fact. The successor of the escheator who filed the bill may appear and conduct the suit without revivor or alteration of the pleadings.

MISSOURI.

BURNS' ANNOTATED PRACTICE CODE, 1896.

SECT. 468. *Suit to perfect Title by Limitation; Proceedings.* — In all cases, when, under the provisions of the section entitled "Limitation in case of certain equitable titles," of chapter 103 of the revised Statutes of Missouri of 1889, the title or claim of any person out of possession of any real estate shall be barred by limitation, and the title thereto has vested in the party in possession, or the party under whom he claims, under the provisions of said section, the party holding the title which has vested by limitation under the provisions of said section may bring his action in the circuit court of the county in which the real estate is situated, to have his record title thereto perfected, and it shall be sufficient for him to state in his petition that he holds the title to such real estate, and that the same has vested in him or those under whom he claims, by limitation under the provisions of said section, and in such action it shall not be necessary to make any person a party defendant except such persons as may appear to have of record a claim or title adverse to that of plaintiff, and upon the trial of such cause, proof of the facts, showing title in plaintiff by limitation by reason of the provisions of said section, shall entitle him to a decree of the court declaring his title by limitation under the provisions of said section, and a copy of such decree may be entered of record in the office of the recorder of deeds of said county, and in any such action service of process may be had as provided in article 4 of this chapter in causes affecting real estate, and if in any case the person whose adverse claim appears of record shall be

dead, then the heirs or devisees of such person, or those claiming by, through or under him or them, if known, shall be made defendants, as adverse claimants, and if they be unknown to plaintiff, then he shall allege in his petition, under oath, that there are, or that he verily believes there are, persons interested in the subject-matter of the petition as heirs or devisees of deceased, or as claiming by, through or under him or them, whose names he cannot insert therein because they are unknown to him, and shall describe the interests of such persons, and how derived, so far as his knowledge extends, and service of process on such unknown person shall be had as in said article 4 is provided in case of unknown parties, *and when such service shall be had, judgment and decree shall be rendered the same as though personal service had been had.*

SECT. 1364. *Land Titles, Petition to contain What, when Evidence of Title is lost; where filed.* — Any person or persons claiming an estate or interest in any lands or real estate in this state, and whose deeds, mortgages, or other written evidence of title or interest, or the record thereof, have been lost or destroyed, may apply by petition to the circuit court of the county in which the land or any part thereof lies, or the record was destroyed, setting forth in said petition a description of said lands, the nature and extent of his, her or their interest or estate therein, and a description of his or her or their deeds, mortgages or other evidence of title, and give the date and contents of said deeds, mortgages or other written evidence of title, and the name or names of the person or persons who executed the same, and the interest therein conveyed to the said complainant, as fully and particularly as said petitioner shall be able. The said petitioner or petitioners shall also set forth in his, her or their petition the manner in which his, her or their deed or deeds, or other evidence of title in and to the lands described in said petition, were lost and destroyed, and praying the said court to hear and make a record of such evidence as the said petitioner or petitioners shall produce, touching or concerning his, her or their alleged estate or interest in and to said lands, described in his, her or their petition; and upon hearing such testimony and proof of title as is produced by the said petitioner or petitioners, in support of his, her or their interest and estate in and to said lands described in the said petition, the estate or interest of the said petitioner shall be adjudged and determined by the said court, according to the evidence adduced by the said petitioner or petitioners in support of the estate or interest which he, she or they may have in and to the said lands described in the said petition, which said petition shall be verified by the affidavit

of the petitioner or petitioners, or by the affidavit of some person petitioning in his, her or their behalf.

Sect. 1365. *Publication of Notice; Proceedings.* — On the filing of said petition with the clerk of said court, it shall be the duty of said clerk to cause a notice to be published in some public newspaper, published in the county where the cause is pending, and if there be no newspaper published in said county, then in some public newspaper published nearest to the county seat of said county, *addressed to all whom it may concern*, and setting forth the filing of said petition, a description of the lands in said petition described, and the estate or interest claimed therein by said petitioner or petitioners, and that a decree will be entered in said cause at the next term of said court after the due publication of said notice, and the title or interest to or in said land adjudged to said petitioner or petitioners, according to the prayer of said petition; which said notice shall be published once a week for at least four weeks, the last insertion to be at least four weeks prior to the term of said court; and if any person or persons shall be in possession of said lands in the petition described, then a copy of the notice shall be duly served upon such person or persons, at least twenty days previous to said regular term of said court, subsequent to the publication of said notice, as hereinbefore provided; and at the next term of said court after the due publication of said notice, the petitioner or petitioners may produce and submit to the court such evidence and proof of title or interest to or in the said lands in the petition described, as he may be able, and also touching and concerning the loss or destruction of his said deed or other evidence of title in and to the lands; which evidence and proofs shall be taken, and proceedings had, after the form and practice and proceedings in civil cases in said court.

Sect. 1366. *Decree of Court Conclusive as to whom; Prima Facie as to whom.* — Any person who may claim an interest or estate in said lands adverse to that alleged in the said petition or petitions may appear and answer said petition, and resist the claims of said petitioner or petitioners in and to the said lands, and may also produce and submit such evidence and proof of his estate or interest in the said lands, as he, she or they, or any person acting in his, her or their behalf, may desire, conforming in all respects to the same rules of equity as hereinbefore provided for the government of petitioner or petitioners; and if, upon a final hearing of the petition, the court shall find the allegations of said petition to be substantially proved, *it shall order a decree in said cause adjudging said petitioner* or petitioners *to be seized of an interest* and estate *in the said land*, according to the allegations

and prayer of the said petitioner or petitioners, which said decree shall be conclusive against all persons and parties who may appear and answer in said cause, or who shall have been personally served with notice, and shall be prima facie evidence against all other persons claiming said premises from the time of entering of the said decree.

SECT. 1367. *Limitations; Court may modify its Decree, when.* — Any person claiming any estate or interest in said lands adverse to the terms of said decree, who has not been personally served with notice, as is provided in section 8409, or who has not entered his appearance in the cause and answered the petition, as provided in section 8410, may enter his appearance in said cause at any time within two years after the entry of the said decree, and, on his motion, after giving twenty days notice to the said petitioner or petitioners, or any person claiming by, through or under him, her or them, said proceedings shall be open for the purpose of hearing, upon proof duly taken, any claim of title or interest to or in the said lands which may be produced by the person making said motion; and on hearing such motion, and evidence and proof thereupon submitted, the court shall adjudge the ownership and title of said lands according to the evidence adduced, modifying its former decree as the evidence and nature of the cause shall in justice and equity require; and if no motion to open such proceedings shall be made within two years from the entering of such decree, the same shall be conclusive against all persons claiming an estate or interest in the said lands adverse to the rights of its said petitioner, as defined in said decree, except infants, lunatics and married women, who shall be allowed respectively two years after their disability is removed to appear and enter their motion for opening of their proceedings, and to make answer to said petition or petitions.

SECT. 1368. *Copy to be recorded, where; may be read in Evidence.* — A certified copy of any decree entered in pursuance of this article shall be recorded in the office of the recorder of register of deeds of the said county where the lands are situate, and a certified copy of said decree, or of the record thereof, may be read as evidence in all courts and judicial proceedings in this state.

SECT. 400. *Publication against Unknown Parties.* — If any plaintiff shall allege in his petition, under oath, that there are, or that he verily believes there are persons interested in the subject matter of the petition, whose names he cannot insert therein because they are unknown to him, and shall describe the interest of such persons, and how derived, so far as his knowledge extends, the court, or the judge or clerk thereof in vacation, shall make an

order as in case of non-residents, reciting moreover all allegations in relation to the interest of such unknown parties.

SECT. 401. *Orders of Publication to be published, where and how long.* — Every order against non-resident, absent or unknown defendants shall be published in some newspaper published in the county where suit is instituted, if there be a paper published there; if not, then in some paper published in this state, which the plaintiff, or his attorney of record, with the approval of the judge or clerk making the order, may designate as most likely to give notice to the person to be notified; the publication shall be for four weeks successively, published at least once a week, the last insertion to be at least fifteen days before the commencement of the term at which the defendant is required to appear.

SECT. 395. *Orders of Publication.* — In suits in partition, divorce, attachment, suits for the foreclosure of mortgages and deeds of trust, and for the enforcement of mechanics' liens, and all other liens against either real or personal property, and in all actions at law or in equity, which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the court, if the plaintiff or other person for him shall allege in his petition, or at the time of filing same, or at any time thereafter shall file an affidavit stating that part or all of the defendants are non-residents of the state or is a corporation of another state, kingdom or country, and cannot be served in this state in the manner prescribed in this chapter, or have absconded or absented themselves from their usual place of abode in this state, or that they have concealed themselves so that the ordinary process of law cannot be served upon them, the court in which said suit is brought, or in vacation the clerk thereof, shall make an order directed to the non-residents or absentees, notifying them of the commencement of the suit, and stating briefly the object and general nature of the petition, and, in suits in partition, describing the property sought to be partitioned, and requiring such defendant or defendants to appear on a day to be named therein and answer the petition, or that the petition will be taken as confessed. If in any case there shall not be sufficient time to make publication to the first term, the order shall be made returnable to the next term thereafter, that will allow sufficient time for such publication.

* SECT. 1737. *When Name or Interest of a Party is Unknown, what Necessary.* — In case one or more of such parties, or the share or quantity of interest of any of the parties be unknown to the

* Relating to partition proceedings.

petitioner, or be uncertain or contingent, or the ownership or th inheritance shall depend upon an executory devise, or the remain der shall be contingent, so that such parties cannot be named, th same shall be so stated in the petition.

MONTANA.

2 Code, 1895.

* Sect. 1348. If a party having a share or interest is unknown or any one of the known parties reside out of the state, or canno be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a general statement of the nature of the action and a brief description of the property which is the subject of the action.

Sect. 1351. When a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court, before the judgment of sale can be made; and where service of the summons has been made by publication, like proof must be required of the right of the absent or unknown parties, before such judgment is rendered; except where there are several unknown parties having an interest in the property, their rights may be considered together in the action, and not as between themselves.

Sect. 1361. The court may confirm, change, modify or set aside the report, and if necessary appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive.

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life.

2. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication.

3. On all other persons claiming from such parties or persons, or either of them.

---

* Relating to partition proceedings.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives or assigns of such decedent, as if it had been entered before his death.

NEBRASKA.

Compiled Statutes, 1895.

Statutes allowing Parties to be brought in by a General Citation.

Sect. 5675. *Unknown Heirs.* — In actions where it shall be necessary to make the heirs or devisees of any deceased person defendants, and it shall appear by the affidavit of the plaintiff annexed to his petition, that the names of such heirs or devisees, or any of them, and their residence are unknown to the plaintiff, *proceedings may be had against such unknown heirs* or devisees, *without naming them*, and the court shall make such order respecting service as may be deemed proper; if service by publication be ordered the publication shall not be less than four weeks.

NEW HAMPSHIRE.

Public Statutes.

[Chapter 243.]

Sect. 1. One or more persons, having or holding real estate with others, in possession, reversion, or remainder after an estate of freehold, if the remainder is vested, may have partition thereof as in this chapter provided.

Sect. 2. Petition may be filed by such person in the supreme court in the county in which the estate or any part thereof lies, particularly describing the estate, the names of all owners or persons interested, if known, and the share of the petitioner therein, and praying for partition thereof.

Sect. 3. If the persons interested in any such real estate with the petitioner are unknown, it shall be described in the petition in the same manner as is required in the case of taxing unimproved lands of non-residents, specifying the share held by each petitioner, and stating that it is held with persons unknown.

Sect. 4. The petitioner shall give notice to all persons interested in the estate, by causing the petition and order of notice thereon to be served on each in the same manner that writs of summons are required to be served.

Sect. 5. If any petitionee or his residence is unknown, or if he resides out of the state and has not had personal notice, the

court shall order publication of the petition and order of notic and may fix the time of the last publication.

SECT. 8. If any petitionee is unknown, the court may, in the discretion, appoint an agent to aid and advise in his behalf making the partition.

SECT. 10. If the issue is determined in favor of the petitione or if after notice the petitionee does not appear, or if no sufficie objection is made, the court shall render judgment that partitio be made, and shall appoint a committee, consisting of three suitabl persons, residents of the county, to make partition of the estate to set off the shares of the several petitioners according to thei respective titles, and to award costs as they deem just.

SECT. 11. The committee shall be sworn. They shall appoin a time and place of hearing, and cause notice thereof in writing signed by the chairman, to be served upon each person interested or his agent or attorney, or to be left at his abode, seven days a least before the day of hearing.

SECT. 12. If any petitionee or his residence is unknown, the committee shall cause the notice to be published.

NEW JERSEY.

PUBLIC LAWS, 1881, PAGE 220.

[Chapter 140, section 1, as amended by chapter 165, section 1.]

SECT. 1. That in all actions heretofore or hereafter commenced in the court of chancery of New Jersey, by bill of complaint affecting or concerning the title to any lands lying in the state of New Jersey, or to foreclose a mortgage, or to establish and enforce any other lien or charge against lands in this state, mentioned and described in said bill, whenever it shall appear by the allegations of said bill of complaint, duly verified by the affidavit of the complainant or his agent or solicitor thereto annexed, that any person mentioned in said bill of complaint as having or having had, claiming, or having claimed, or believed by the complainant to claim or to have claimed, any right, title, interest or estate in or to said lands, or any part thereof, or any mortgage or other lien or charge thereon, or his heirs, devisees or personal representatives, are proper parties defendant to said bill of complaint; and that the complainant, after diligent and careful inquiry therefor, made as in case of absent defendants, has been unable to ascertain whether such person is still alive, or if he is known or believed to be dead, has been unable to ascertain the names and residence of his heirs, devisees or personal representatives, or of such of them as are proper parties defendant as aforesaid, such action may proceed

against such person by name, and his heirs, devisees and personal representatives as in case of absent defendants whose names are known; provided, nevertheless, that such notice as is now required by law to be published against absent defendants in default of personal service, *addressed to such person by name and to "his heirs, devisees and personal representatives," and containing such further statements and giving such further time as the chancellor may by his order direct*, be first published and mailed in such manner as the chancellor may by his order in said action direct; *and in case such person* or his heirs, devisees or personal representatives *shall not appear*, plead, answer or demur within the time limited in said notice, or further allowed by the chancellor, if he shall think proper, on proof to the satisfaction of the chancellor of mailing and publication of said notice, as directed, *such action may proceed* in all respects *as though* such person or his heirs, devisees or personal representatives *had been duly named and described and served with process* of subpœna in said action, and had failed to appear, plead, answer or demur to the complainant's bill of complaint within the time thereto allowed by law.

SECT. 2. That *all such defendants* and all persons falling within the description of "heirs, devisees or personal representatives" of the defendant supposed to be dead, as aforesaid, *shall* thereupon *be bound* by all orders and decrees in said cause, as if they had been duly named and described and served with process within this state.

PUBLIC LAWS, 1893, PAGE 256.

SECT. 1. That in all actions hereafter commenced in the court of chancery of New Jersey, by bill, petition, or otherwise, whenever it shall appear by the allegations of the said bill or petition, duly verified by the affidavit of the complainant or petitioner, or by one of them, if there shall be more than one complainant or petitioner, or his or their agent or solicitor, thereto annexed, that any person mentioned in said bill or petition, or his heirs, devisees or personal representatives, are proper parties defendant to said bill of complaint or said petition; and that the complainant after diligent and careful inquiry therefor, made as in case of absent defendants, has been unable to ascertain whether such person is still alive, or if he is known or believed to be dead, has been unable to ascertain the names and residences of his heirs, devisees or personal representatives, or such of them as may be proper parties defendant as aforesaid, *such action may proceed against such person by name, and his heirs, devisees and personal representatives*, as in the case of absent defendants whose names are known; *provided, nevertheless*, that such notice as is now required by law

to be published against absent defendants in default of perso service, *addressed to such person by name, and to his "hei devisees and personal representatives,"* and containing such furth statements and giving such further time as the chancellor may his order direct be first published and mailed in such manner the chancellor may, by his order in said action, direct; *and in ca such person*, or his heirs, devisees or personal representative *shall not appear*, plead, answer or demur within the time limit in said notice, or further allowed by the chancellor, if he sh think proper, on proof to the satisfaction of the chancellor mailing and publication of said notice as directed; *such acti may proceed* in all respects *as if such person*, or his heirs, devise or personal representatives *had been duly named* and described a *served with process* of subpœna in said action, and had failed plead, answer or demur to the complainant's bill of complaint, petitioner's petition within the time thereto allowed by law.

SECT. 2. That *all such defendants*, and all persons fallin within the description of "heirs, devisees or personal represent tives" of the defendant supposed to be dead as aforesaid, *sha* thereupon *be bound* by all orders and decrees in said cause as they had been duly named and described and served with proces in this state.

NEW YORK.

LAWS OF 1890.

[Chapter 503.]

AN ACT to quiet the title to real property in certain cases, con veyed pursuant to judicial decree, which decree has been los or destroyed.

SECT. 1. Whenever real property shall have been conveyed by a sheriff or referee, pursuant to a judicial decree, which decree ha been lost or destroyed, and the defendants (other than lienors o incumbrancers) named in the notice of pendency of the action i which such decree was made, or those who might claim unde them, or either of them, are dead, unknown or their whereabout cannot after diligent inquiry be ascertained, the person who ha been or he and those having his estate who have been, for thirty years in actual possession of such property claiming it in fee unde said sheriff's or referee's deed, which deed shall have been recorde at least thirty years may, maintain a special proceeding *for th purpose of establishing judicially* his or their title to such real prop erty.

SECT. 2. A person or persons, desiring to institute a proceed ing under this act, must present a petition to the supreme court a

a special term to be held in the judicial district in which the real property is situated, setting forth the facts proving to the satisfaction of the court, that the case is one of those specified in the first section of this act, and must describe the property with common certainty, and state what, if any, liens or incumbrances exist thereon, and the names of the persons, if any, besides the petitioners, who have been in the actual possession of the property during the past thirty years claiming title as owners thereof in fee, and how such title was derived, and shall also annex to said petition a duly certified copy of the sheriff's or referee's deed recorded thirty years since under which petitioners claim title.

SECT. 3. Upon the presentation of such petition, duly verified in the manner prescribed for the verification of pleadings by the code of civil procedure, the said court shall make an order for the publication of a *notice requiring all persons claiming any interest in the real property described in such petition* to appear before the court at a special term thereof, to be held at a time and place to be therein specified, not less than three months nor more than six months thereafter, and show cause, if any they have, why they should not be forever barred from maintaining any action or proceeding for the recovery of the real property, which shall be substantially described as set forth in said petition, and which notice shall also contain a reference to the time and place of record of the sheriff's or referee's deed referred to in this act. Said publication shall be made once a week for three months successively prior to the return day named in said notice in two newspapers designated in the order as most likely to give notice to any claimants of the property.

SECT. 4. In case the property described in said sheriff's or referee's deed shall have been subdivided, the owner or owners of the several parcels thereof may unite in the same petition and proceeding provided for by this act.

SECT. 5. Upon the return-day named in said notice the court shall proceed summarily to inquire into the truth of the matters set forth in the petition, and may appoint a referee for that purpose, and if there shall be no appearance by any person claiming any adverse interest to the petitioners in the real property described in the petition the *court may make a final order declaring that the title of the petitioner to such real property has been judicially established*, which final order, together with the petition and order for and proof of publication of the notice, and the proofs taken before the court of referee shall be filed in the office of the clerk of the county in which the real property is situated, *and such final order shall be evidence of the facts so declared to be established thereby in all courts*

and places, and thereafter no action or proceeding for the recovery of the real property described in said final order or any part thereof, or of any interest therein, shall be maintained by any person named as a defendant in the notice of pendency of action referred to in the first section of this act, or by any person or persons claiming under such defendant or either of them.

SECT. 6. If any person shall appear on the return day of said notice and claim in writing an interest in the real property adverse to that of the petitioners, stating the nature of his claim and his place of residence, the court may proceed in like manner to inquire into the truth of the facts stated in the petition and may make a final order in like manner and with like effect as above provided, except that such final order shall not affect in any way any person who shall have appeared on the return day and asserted a claim adverse to the petitioners, as herein provided for.

SECT. 7. No such final order shall be made until the petitioners named in said proceedings, or their attorney, shall file in the clerk's office of the county in which such real property is situated a notice of the pendency of the said special proceeding, containing the names of all the persons claiming to be then owners of the property in fee, pursuant to said sheriff's or referee's deed, the object of the proceeding, together with a brief description of said property. Each county clerk with whom such notice is filed must immediately record it in the book kept in his office for recording of notices of pendency of an action, and index it to the name of each person claiming to be owner as aforesaid, and said clerk shall be entitled to receive for his services the same fees therefor as are now allowed by law for filing, recording and indexing a notice of pendency of action.

Code Civil Procedure, Section 1582, as amended by Laws of 1889, Chapter 39, Laws of 1891, Chapter 365, and Laws of 1893, Chapter 203.

SECT. 1582. Where a person has been made a defendant as an unknown person, or where the name of a defendant is unknown, or where the summons has been served upon a defendant without the state, or by publication, and he has not appeared in the action, the court must direct his portion to be invested in permanent securities, at interest for his benefit, until claimed by him or his legal representatives; but after the lapse of twenty-five years from the time of the payment into court, or to the treasurer of any county, of any portion of the proceeds of the sale of real property, for unknown heirs, heretofore or hereafter to be made in any action of partition, without any claim therefor having been made by any

person entitled thereto, and upon there being made and presented to the court, at a special term thereof, proof, by petition or otherwise, showing to the satisfaction of the court, that due inquiry for such unknown heirs, or their representatives, has been made and that they cannot be found, and that no claim has been made for such portion of said proceeds by any person entitled thereto, proceedings shall thereupon be taken in said court, and an investigation had therein as to the heirship, death or whereabouts of such unknown heirs or their representatives, and as to the known heirs of the ancestor of such unknown heirs, the next of kin, representatives and distributees of such known heirs, and as to all persons interested in such proceeds, and their respective interests therein, and the said court shall, by an order made in the action, direct that a notice entitled in the action and signed by the petitioner, or his attorney, *and directed to such unknown heirs or their representatives*, and to known heirs, their next of kin, representatives, or distributees, *and all persons interested in such proceeds*, be served upon them by the publication thereof, the same to be published once in each week for six successive weeks in a newspaper published in the county where the action was brought, and in such other newspapers as the court may direct, ordering and requiring such unknown heirs or their representatives, and all known heirs, their next of kin, or representatives, *and all persons interested in such proceeds*, and each of them to be and appear in said court at a special term thereof, at a time and place to be specified in said order and notice, and at least six weeks from the date of the first publication of such notice, to then and there establish their heirship and identity, kinship and interest, and submit any proof, as to such unknown heirs, or their representatives, and the known heirs, their next of kin, representatives or distributees, *and all persons interested* and their interest in such proceeds, they may desire, and that in case of their default in so doing, that the said proceeds will be distributed and paid over to the known heirs of the ancestor from whom such unknown heirs derived title thereto, and to their heirs, next of kin, representatives, distributees and assigns, and they and each of them shall thereafter be forever barred of and from all and every cause or causes of action for such proceeds, or on account thereof, or growing out of the distribution thereof, and of and from all right, title, claim and interest in and to such proceeds, and shall be deemed to have surrendered all right, claim and interest in and to such proceeds. The order must contain a direction that a copy of the notice must be served on each of the persons named in the order, if within the state, in the manner prescribed for the service of a

summons on a defendant in an action in the supreme court, at least twenty days before the time specified in the notice. The publication of such notice, as required by said order, is hereby made and shall be deemed and taken for all purposes to be due and complete service upon each and every of such unknown heirs or their representatives, and the known heirs, their next of kin, and representatives, *and all persons interested* in such proceeds, of due notice of the proceeding to distribute and pay out such proceeds, *and shall be conclusive upon each and all of them.* Proof of such personal service may be made by the affidavit of the person making the same, and proof of the publication of such notice may be made by affidavit of the publisher of such paper or papers. At the time and place specified in the said order and notice, such unknown heirs or their representatives, and all known heirs, their next of kin, representatives or distributees, devisees, *and all persons interested in such proceeds*, shall appear in court, in person or by attorney, and make proof establishing their heirship and identity, kinship and interest in such proceeds, and upon proof being made to the satisfaction of the court of the heirship and identity of the unknown heirs, the proceeding for distribution shall be dismissed. And if such unknown heirs or their representatives do not so appear in court at the time and place specified in such notice and order, to establish their heirship and identity, kinship or interest, they and each of them, and every person claiming under or through them, shall thereafter be forever barred of and from all and every cause or causes of action for such proceeds, or on account thereof, or growing out of the distribution of such proceeds, and of and from all right, title, claim and interest in and to such proceeds, and shall be deemed to have surrendered all right, claim and interest in and to such proceeds. And upon proofs being made of such publication, and showing to the satisfaction of the court that such unknown heirs or their representatives cannot be found, or are dead, the said court shall have power to decree accordingly, and to decree that the share or interest of such unknown heirs in such real property was vested, at the time of such sale, in the known heirs of the ancestor from whom such unknown heirs derived title thereto, and to decree that the unclaimed portion of such proceeds was vested at the time of such payment in such known heirs, and that such heirs, their heirs, next of kin, representatives, distributees, devisees and assigns, are entitled thereto; and the said court shall make an order in such action, directing the payment to them, or their assigns, of the respective shares or portions of, or interest in such proceeds to which they are entitled; and which order shall be entered in the office of

the clerk of the county where the original action was brought, and after having been so entered for three months, shall be conclusive evidence of the regularity of the proceedings upon which it is based, and of all the facts set forth therein; and, upon serving upon the county treasurer a certified copy of such order, the treasurer shall so pay over and distribute such proceeds, after deducting his lawful commissions, and shall thereupon be exempt from all liability on account thereof; and if any such proceeds shall have been paid over by any county treasurer to the treasurer of the state of New York, under the provisions of section 753 of this act, due notice of said applications and proceedings shall be given to the comptroller of the state of New York, and the said proceeds shall be paid out by the treasurer of the state of New York, as provided by sections 751 and 753 of this act, and upon such payment he shall thereupon be exempt from all liability on account thereof.

CODE CIVIL PROCEDURE.

SECT. 1541. *Provision where a Party is Unknown.* — Where a defendant having a share or interest in the property is unknown, or where his name or part of his name is unknown, and the summons is served upon him by publication, or without the state, pursuant to an order for that purpose, as prescribed in article second of title first of chapter fifth of this act, the notice subjoined to the copy of the summons as published, or served therewith, must, in addition to the matters required in that article, state briefly the object of the action, and contain a brief description of the property.

* SECT. 438. *Cases in which Service of Summons by Publication, etc., may be ordered.* — An order directing the service of a summons upon a defendant, without the state, or by publication, may be made in either of the following cases.

1. Where the defendant to be served is a foreign corporation; or, being a natural person, is not a resident of the state; or where, after diligent inquiry, the defendant remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state.

5. Where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in, or lien upon, specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to such property.

---

* As amended in 1879 and 1884.

When a copy of the summons is required by subdivision first or subdivision second of section 426 of this act, or by section 429 of this act, to be delivered to a person other than the defendant, an order directing the service of a copy of the summons upon such person without the state, or by publication, may be made as prescribed in this section, as if such person was the defendant in the action, and upon a verified complaint and the same proof with respect to such person, as is required in the next succeeding section with respect to a defendant. And sections 440 to 444 both inclusive, apply to the proceedings in like manner as if such person was a defendant.

SECT. 2518. *Persons constituting a Class; when to be cited; Citation when Some are Unknown.* — Where it is prescribed, in any provision of this chapter, that a petitioner must pray that a person, or that creditors, next of kin, legatees, heirs, devisees, or other persons constituting a class, may be cited for any purpose, all those persons are necessary parties to the special proceeding. Where persons to be cited constitute a class, the petitioner must set forth, in an affidavit, the name of each of them, unless the name, or part of the name, of one or more of them cannot, after diligent inquiry, be ascertained by him; in which case, that fact must be set forth, and the surrogate must, thereupon, inquire into the matter. For the purpose of the inquiry, he may, in his discretion, issue a subpœna, requiring any person to attend before him to testify respecting the matter. If he is satisfied, upon the allegations of the petitioner, or after making the inquiry, that the name of one or more of the persons to be cited, cannot be ascertained with reasonable diligence, the *citation may be directed* to that person or those persons, *by a general designation, showing his, her, or their connection with the decedent, or interest in the property or matter in question; or otherwise sufficiently identifying the person or persons intended.* A citation, thus directed, has the same force and effect, as if it was directed to the person or persons intended, by their names; and where the person or persons so intended are duly cited, in any manner prescribed by law, the decree binds them, as if they were named therein. A petition, duly verified, is deemed an affidavit, within the meaning of this section.

SECT. 2523. *Service by Publication upon Persons Unknown, etc.* — The surrogate may also make an order, directing the service of a citation without the state, or by publication, in either of the following cases:

1. Upon a party to whom a citation is directed, either by his full name or part of his name, where the surrogate is satisfied, by

affidavit, that the residence of that party cannot, after diligent inquiry, be ascertained by the petitioner.

2. Upon one or more unknown creditors, next of kin, legatees, heirs, devisees, or other persons included in a class, to whom a citation has been directed, designating them *by a general description*, as prescribed in this article.

* SECT. 1979. *When Unknown Claimants may be made Defendants.* — If the property is not occupied, and no person is known to the attorney general as claiming title thereto, the defendant or defendants may be designated as "*unknown claimants*" without any other description. In all other respects, section 451 of this act applies to an action, in which the defendant or defendants are thus designated.

NORTH CAROLINA.

STATUTES OF 1887.

[Chapter 284.†]

SECT. 1. That section 1892, of chapter 47 of the Code be amended by adding to the end thereof the following, to wit, "If it be made to appear to the court by affidavit or otherwise that there are any person or persons interested in the premises whose names are unknown to, and cannot after due diligence be ascertained by the petitioner or petitioners, the court shall order notices to be given to all such persons by publication of the petition or of the substance thereof with the order of the court thereon in one or more newspapers to be designated in the order. If after *such general notice by publication* any person interested in the premises and entitled to notice fails to appear the court shall in its discretion appoint some disinterested person or persons to represent the owners of any shares in the property to be divided, the ownership of which is unknown and unrepresented."

2. That section 1894 of said chapter be amended by adding at the end thereof the following: "If there be any of the tenants in common whose names are not known or whose title is in dispute the share or shares of such persons shall be set off together as one parcel."

3. That section 1908 of said chapter be amended by inserting after the word "state" in line four the words "or when the name of any tenant in common is not known."

---

* Relating to proceedings to establish an escheat.

† Relating to partition proceedings.

OHIO.

2 BATES' ANNOTATED OHIO STATUTES.

SECT. 5053. *Proceedings when Residence of Heir or Devisee is Unknown.* — When an heir or a devisee of a deceased person is a necessary party, and it appears by affidavit that his name and residence are unknown to the plaintiff, proceedings against him may be had without naming him, and the court, or a judge, thereof, shall make an order respecting the publication of notice, and the order shall require not less than six weeks' publication.

See Sullivant *v.* Weaver, 10 Ohio St. 275.

SECT. 6416. *Petition for Appropriation, and in what Court to be filed.* — In any case the corporation may file with the probate judge a petition, verified as in a civil action, containing a specific description of each parcel of property, interest, or right, within the county, sought to be appropriated. The work, if any, intended to be constructed thereon, the use to which the same is to be applied, the necessity for the appropriation, the name of the owner of each parcel, if known, or if not known, a statement of that fact, the names of all persons having or claiming an interest, legal or equitable, in the property, so far as the same can be ascertained, and a prayer for the appropriation of the property.

SECT. 6419. *Service by Publication.* — When a person having an interest is unknown, or his residence is beyond the state, or unknown, the corporation may make service by publication against him, by publishing in a newspaper of general circulation in the county where the petition is filed for four consecutive weeks, a notice containing a summary statement of the objects and prayer of the petition, so far as it relates to the property of the person thus to be notified, the court in which it is filed, and the time when such person is to appear thereto, not less than ten nor more than twenty days after the last publication; and the fact of publication may be proved by the affidavit of any person knowing the same.

OREGON.

1 HILLS' ANNOTATED LAWS OF OREGON (2D ED.).

* SECT. 426. The summons shall be directed by name to all the tenants in common who are known, and in the same manner to all lien creditors who are made parties to the suit, *and generally to*

* Relating to partition proceedings.

all persons unknown having or claiming an interest or estate in the property.

Sect. 427. If a party, having a share or interest in or lien upon the property be unknown, or either of the known parties reside out of the state or cannot be found therein, and such fact be made to appear by affidavit, the summons may be served upon such absent or unknown party by publication, directed by the court or judge, as in ordinary cases. When service of the summons is made by publication, it must be accompanied by a brief description of the property which is the subject of the suit.

Sect. 432. The court may confirm or set aside the report in whole or in part, and if necessary appoint new referees. Upon the report being confirmed, a decree shall be given that such partition be effectual forever, which decree shall be binding and conclusive, —

1. On all parties named therein, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder, or inheritance of such property or any part thereof after the termination of a particular estate therein, or who by any contingency may be entitled to a beneficial interest in the property, or who have any interest in any undivided share thereof as tenants for years or for life;

2. On all persons interested in the property who may be unknown, to whom notice shall have been given of the application for partition by publication, as directed by section 427; and

3. On all other persons claiming from such party or persons or either of them.

PENNSYLVANIA.

2 Brightly's & Purdon's Digest.

[Page 1639.]

Sect. 5. The courts of common pleas of the different counties in this Commonwealth, are hereby authorized to issue writs of partition in all cases (l) in which partition is demanded, of lands, tenements or hereditaments in this Commonwealth, owned and held in joint tenancy, coparcenary or in common (m) and whether the demandant or defendants be minors or of full age; and where a minor or minors is or are the defendant or defendants in any action of partition, the writ shall be served upon his, her or their guardian or guardians, or if he or she have no guardian, then upon a guardian to be appointed for this purpose by the court, or notice thereof given in the manner hereinafter directed. And upon appearance of the parties, or on default being made, (n) the court shall pro-

ceed to examine the plaintiff's title, and quantity of his part or purpart, and accordingly as they shall find his right or purpart to be, they shall give judgment, and award a writ to make partition, whereby such proportion or purpart shall be set out in severalty; (o) which writ being executed, after ten days public notice, and the inquest of partition being returned and final judgment thereupon entered, the same shall be good, *and shall conclude all persons whomsoever*, in the same manner as though the party were under no disability of age or otherwise, *and notwithstanding all persons concerned are not named in the proceedings*, nor the title of the defendants truly set forth. (p)

[Page 1641.]

SECT. 16. In all actions of partition that may hereafter be commenced in any court of this Commonwealth, all the parties in interest shall be named in the writ, declaration and notices, when known; but if it shall appear, on oath or affirmation, that the names or residence of any of the parties are unknown to the plaintiff or plaintiffs in such action, the court shall have power to direct notice to be given to such parties by publication in one or more newspapers, *describing the parties as far as practicable*, as shall appear to the court reasonable and proper; *and the proceedings shall be as effectual, to all intents and purposes, as if all the parties had been named in the proceedings.*

1 BRIGHTLY'S & PURDON'S DIGEST.

[Page 606.]

SECT. 185. In the proceedings for the partition and valuation of an intestate's real estate, the parties in interest (d) shall be named in the petition, decree and notices, when known; (e) but if it shall appear, on oath or affirmation, that the names or residence of any of the parties are unknown to the applicant for the partition, the orphans' court shall have power to direct such notices to be given to such parties by publication in the public newspapers, *describing the parties as far as practicable*, as shall appear to the court to be reasonable and proper; *and the proceedings shall be as effectual, to all intents and purposes, as if all the parties had been named in the proceedings.*

3 PEPPER AND LEWIS' DIGEST.

Supplement [1894 to 1897].

[Page 504.]

DISCHARGE OF INCUMBRANCES

8. *Proceedings to discharge Encumbrance due and unclaimed for Twenty-one Years.* — In all cases in which, under any proceeding

in any court of record of this Commonwealth, or under any deed, last will and testament, mortgage, dower, recognizance, judgment, decree or other obligation or instrument, any money has been or may hereafter be charged upon land, payable presently or at a future time, and the period of twenty-one years has elapsed or shall have elapsed after the principal of such encumbrance or charge has become or shall have become due and payable, and no payment has been or shall have been made within said period of twenty-one years on account of such encumbrance or charge by the owner or owners of the land sought to be released and discharged, and no sufficient release, acquittance or acknowledgment of payment of such encumbrance or charge is of record in the county in which the land is situated, it shall be lawful for the orphans' court of the county in which such land is situated, in cases in which the encumbrance or charge is under a decree of an orphans' court, or by last will and testament, dower or recognizance charged by said court, and for the common pleas court of the county in which such land is situated in all other cases, upon petition of the owner or owners of the land, or any part thereof, subject to the encumbrance or charge, setting forth the facts, verified by affidavit, and alleging that no payment of principal or interest has been made within said period of twenty-one years on account of said encumbrance or charge by the present owner or owners, or so far as can be ascertained by his or their predecessors in title, and giving the names of all known parties interested in such encumbrance or charge, their places of residence, if known, and a description of the land subject to the charge and sought to be released and discharged, to direct the sheriff of the county to give notice to all such known parties in the county, whose residences are known, by copy served personally or left at their places of abode, and to all parties out of the county, if any, *and to all unknown parties*, if any, by public notice published in one or more newspapers published within or nearest the county once a week for four successive weeks, which notice shall briefly state the facts set forth in the petition and require the parties to appear in court on a day designated at least thirty days after the filing of the petition and service of notice as aforesaid to be made at least twenty days prior to the day designated for appearance, at which time, should any person or persons appear and claim payment for or on account of such encumbrance or charge or any part thereof, the court shall enter a rule on the person or persons so appearing and claiming to commence proper legal proceedings to enforce payment of their claim or claims within thirty days after the entry of such rule, and in default of compliance with such rule or in the event of a non-appearance of any person to answer the petition or in the event of the joinder

of all parties in interest in such petition, *the court* being satisfied of the truth of the allegations of the petition *shall decree* and direct *that the land subject to the encumbrance* or charge or any part thereof to be released or discharged *shall be released and discharged from the same*, and the payment thereof, and that a copy of the petition and decree shall be entered of record in the office of the recorder of deeds of the county, for recording which he shall be entitled to a fee at the rate he is entitled by law to charge for recording deeds, *which decree and record shall* forever thereafter *operate as a release* and discharge *of the land from the encumbrance* of the charge and shall bar all actions brought thereon.

[Page 506.]

12. *Proceedings to discharge Dower due when Owner cannot be found.* — That in all cases where any dower, legacy or other charge upon land, or any part thereof, is due and payable and where the person or persons to whom such dower, legacy or other charge upon land or any part thereof is due and payable cannot be found after diligent and reasonable research, it shall be lawful for the owner or owners of the lands bound by such dower, legacy or other charge upon land or any part thereof, to apply by petition to the orphans' court of any county wherein said lands are situate, setting forth the premises, and also the name or names of the person or persons to whom said dower, legacy or other charge upon land or any part thereof is due and payable if known, and if unknown, then stating that fact, as well as the time when said dower, legacy, charge upon land or any part thereof becomes due and payable. Whereupon the court shall direct the sheriff of said county to give public notice of the facts set forth in said petition, by publication for three successive weeks prior to the first day of the term of court next succeeding the term at which said petition was presented, in at least one nor more than three newspapers published within or nearest said county *requiring the person or persons to whom the money or moneys arising therefrom from said dower, legacy or other charge upon land, or any part thereof, is due and payable*, or wishes to lay claim to the moneys as aforesaid, to appear before said court at the term of said court next succeeding the term in which the petition was presented as aforesaid, and show cause why the money or moneys arising therefrom *sic* said dower, legacy or other charge upon land, or any part thereof, as set forth in said petition, should not be paid into said court; and in the event of the non-appearance of any person or persons to show cause, as aforesaid, or in the event of the appearance of any person or persons claiming the moneys as set forth in said petition,

but who fail to show to said court that they (the persons thus claiming) are entitled thereto, the said *court*, being satisfied of the truth of the facts set forth in said petition, *are* hereby *authorized*, empowered and required *to enter a decree that the moneys due and payable*, as aforesaid, together with interest thereon from the time that said dower, legacy or other charges upon land, or any part thereof, became due and payable, to the time of final decree, *be paid into said court;* and upon the payment of the costs, said decree shall be certified by the clerk of said court to the recorder of deeds of said county, whose duty it shall be, upon being paid therefor, to record said decree, indexing it in the name or names of the petitioner or petitioners as grantee or grantees, *and thereupon said dower*, legacy or other charge upon land or any part thereof which has been paid into said court as aforesaid, *shall be satisfied, extinguished and released*, and all action thereon forever barred; provided, that when the amount of such dower, legacy or other charge upon land does not appear as a matter of record, the court may by the appointment of an auditor or investigation in open court, ascertain and fix the amount so alleged to be due.

RHODE ISLAND.

GENERAL STATUTES, 1896.

[Chapter 265.]

SECT. 8. In suits at law or in equity for partition of real estate, in which it may be alleged or may appear that any party or person interested therein, not a party plaintiff, is not a resident of the state, or where it is alleged or may appear that any person interested has left the state and it is not known where he is or whether alive or dead, and if dead, whether leaving children or not, or that some person unknown to the plaintiff is interested therein, the court before whom the suit is pending may order notice to be given to any such party or person, by ordering a copy of their order to be published in some newspaper published in this state for such length of time as they may deem proper, and may also in their discretion order letters, post-paid and directed to such party or person, to be deposited in the post office; and where notice is given as ordered by the court, they may proceed and render judgment in such suit in the same manner and with the same effect as if such party or person had received actual or personal notice or had appeared and answered to the suit.

SECT. 16. In suits in equity for partition, the appellate division of the supreme court may, in their discretion upon motion of any party to such suits, order the whole premises sought to be

divided, or any particular lot, portion or tract thereof, or the interest of the plaintiff or plaintiffs or of the defendant or defendants in the whole premises, or in any particular lot, portion or tract thereof to be sold at public auction, under the direction of the court, by the commissioners appointed to divide the same.

SECT. 17. No person interested in the estate and not a party to the suit shall be bound by such sale, but the court may, upon motion, proceed to make all persons interested in such estate parties thereto, though non-resident, absent or unknown, in the manner hereinbefore provided; in which case, if the whole of their shares of the estate be ordered to be sold, such decree shall forever thereafter, in favor of the purchaser of such estate or shares, and of those claiming under or by virtue of him, be binding upon such non-resident, absent or unknown person although not appearing to such suit.

SECT. 24. In actions at law for partition any party aggrieved by any direction or ruling of the common pleas division of the supreme court, or by the decision of said division, or verdict of the jury, if any, on which a judgment that partition shall be made may be entered, may prefer his petition to the appellate division of the supreme court for a new trial, in the manner prescribed in section five and following sections of chapter 251; but if no such petition shall be preferred, such judgment shall be final, and said common pleas division thereupon, on the motion of the plaintiff in such writ of partition, shall appoint and commission, at its discretion, one or more discreet, impartial and disinterested persons to make partition pursuant to such judgment, who shall be sworn to the faithful discharge of their trust.

SECT. 25. The persons so appointed, first giving reasonable notice to the respective parties, shall make partition between them according to their several rights, as ascertained by the judgment of the court ordering such partition.

SECT. 26. In case non-resident, absent or unknown parties or persons be interested in such partition, and whether the commission to make partition issue at law or in equity, the court issuing the same shall order such notice to be given to such parties or persons interested, by the commissioners appointed to make partition, as such court shall judge proper, and the same, when given, shall for all purposes be as effectual as personal notice.

SOUTH CAROLINA.

1 REVISED STATUTES, 1893.

SECT. 2438. Each of the Escheators, as hereinbefore provided for, in every case where he has knowledge or belief, or information

from another, that certain lands in his County have escheated to the state by the death of the person seized in fee simple, either in law or in fact, without leaving any person who can lawfully claim such lands, either by purchase or descent, from such former proprietor, shall, on such knowledge or information, or the order of any court of record, issue his notification of such supposed escheated lands to one of the judges of the circuit court, at least two months previous to the next session of the said court to be held in the county where such lands lie.

Sect. 2439. The judge presiding at such court shall cause the jury (being first duly sworn) to proceed and make a true inquest of all such supposed escheated lands, which by the escheator shall be subjected to their investigation, and a true verdict make thereon; whereupon the judge shall certify the same, under his hand and the seal of the court, to the escheator, who must record the same in a book to be kept for that purpose, and return the original within two months after date thereof into the office of the clerk of the said court, to be there filed and kept as a record thereof.

Sect. 2440. Upon the return of the inquest into his office, the said clerk shall thereupon cause to be advertised in a newspaper of the county, or other nearest gazette, the first week in every month, for six months, a notice containing a particular description of the lands, the name of the person last seized, and the supposed time of his or her death, together with the part of the world in which he or she was supposed to have been born, *and requiring his or her heirs, or others claiming under him or her*, to *appear and make claim*.

Sect. 2444. If any person shall appear within five years and make good title to such lands in the court of common pleas, on an issue tried, he shall forthwith receive adequate compensation.

SOUTH DAKOTA.

Annotated Statutes, 1899.

Sect. 6696. *Power of Court.* — That in all actions arising under chapter twenty-nine,* of the code of civil procedure, of this state, and in actions brought for the satisfaction of record of mortgages and other liens upon real property, whenever the defendant is not found within the jurisdiction of the court and service of summons therein is made on such defendant by publication, or whenever any defendant in such action refuses or neglects to make a conveyance or cancel an incumbrance pursuant to the judgment of the court, *the court shall have power by its judgment*

* Actions to determine conflicting claims to real property.

to determine and establish the title to the property in question, to annul, cancel and remove any and all conveyances and incumbrances constituting a cloud upon such title, and whenever a conveyance of such property is directed to be made by such judgment, and likewise in actions for the specific performance of contracts relating to real property in this state, whenever the defendant is not found within the jurisdiction of the court and service of summons therein is made on such defendant by publication, or whenever any defendant in such action refuses or neglects to convey the property involved in the suit pursuant to the judgment of the court, this shall be done in behalf of such defendant by a trustee appointed by the court for that purpose.

* Sect. 6598. *Service by Publication.* — If the party having a share or interest be unknown or any one of the unknown parties reside out of the state, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property, which is the subject of the action.

Sect. 6607. *Judgment on Report; Effect.* — The court may confirm, change, modify or set aside, the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive.

2. On all persons interested in the property, who may be unknown, to whom notice has been given in the action for partition by publication.

TENNESSEE.

Code of 1896.

Sect. 3826. *Duty of District Attorney.* — It shall be the duty of the district attorney, in all cases in which he has a good right to believe an escheat has occurred in his district, to file a bill in the chancery court of the county wherein the land so escheated may lie, in the name of the state of Tennessee, and without security, to have the same declared escheated.

Sect. 3828. *Publication to Unknown Heirs; Appearance and Defence.* — In addition to the foregoing named defendants, under said bill, there shall be a publication made for thirty days in a newspaper published in the county in which the bill is filed, or, if no newspaper be published in the county, then the nearest news-

* Relating to partition proceedings.

paper so published, *calling upon unknown heirs of such deceased person, and all persons claiming under him or her*, in any manner or way, whatever, to enter his, her, or their appearance as defendants to said bill or suit, and all persons having an interest in the same may come into court and defend the same according to the rules of said court.

* Sect. 5018. *Contents of Bill or Petition.* — The bill or petition shall set forth, as far as known, the names of the owners, their residences, which of them are infants or married women, and to whom married; describe the property, its situation, the title by which it is held and possessed, and such other facts as may be deemed necessary, and pray the court to cause it to be divided among the claimants, according to their respective rights and titles.

Sect. 5019. *Parties.* — Every person having such interest, whether in possession or otherwise, and every person entitled to dower, if the same has not been allotted, shall be made a party.

Sect. 5020. *Parties Unknown, Interests Contingent, etc.* — In case any one or more of such parties, or the share or quantity of interest of any of the parties, be unknown to the petitioner, or be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be a contingent remainder, so that such parties cannot be named, the facts shall be set forth in such petition.

Sect. 5021. *Notice.* — Notice of this petition, stating the time it is intended to present it, and the court at which it is to be presented, shall be served upon the parties who do not join in the petition, at least five days before its presentation, or given by publication, as hereinafter provided.

Sect. 5023. *Publication.* — If any of the parties defendant are non-residents or unknown, or of unknown residence, the court, or its clerk, may order and make publication for them, under the provisions of this code in like cases in chancery where personal service of process is dispensed with.

Sect. 5040. *Upon whom Conclusive.* — The partition thus made is conclusive:

1. On all parties named in the proceedings who have at the time any interest in the premises divided, as owners in fee or as tenants for years or as entitled to the reversion, remainder, or inheritance of such premises after the termination of any particular estate therein; or who by any contingency in any will, conveyance, or otherwise, may be or may become entitled to any beneficial interest

* Relating to partition proceedings.

in the premises; or who shall have any interest in any individual share of the premises, as tenants for years, for life, by the curtesy, or in dower.

2. On all persons interested in the premises who are unknown, to whom notice has been given by publication, as hereinbefore directed.

3. On all persons claiming from such parties or persons or either of them.

TEXAS.

Revised Statutes, 1895.

Art. 1821. If any person die seized of any real, or possessed of any personal estate, without any devise thereof, and having no heirs, or where the owner of any real or personal estate shall be absent for the term of seven years, and is not known to exist, such estate shall escheat to and vest in the state; provided, that where no will is recorded or probated in the county where such property is situated within seven years after the death of the owner, it shall be prima facie evidence that there was no will, and, where no lawful claim is asserted to, or lawful acts of ownership exercised in such property for the period of seven years, and this has been proved to the satisfaction of the court, it shall be deemed prima facie evidence of the death of the owner and of the failure of heirs, and the court trying the cause may, if such evidence is not rebutted, find therefrom in favor of the state.

Art. 1822. When the district or county attorney shall be informed or have reason to believe that an executor under the will of any person who has died without heirs and without having devised his estate, has not accepted the trust, and that no administrator with the will annexed has been appointed; or where such attorney shall discover that no letters of administration on the estate of an intestate who has died without heirs have been granted; or where such attorney finds any estate, real or personal, in the condition specified in the next preceding article (1821) he shall file a petition in behalf of the state in the district court of the county where such property or any part thereof lies, which petition shall set forth a description of the estate, the name of the person last lawfully seized or possessed of the same, the names of the tenants or persons in actual possession, if any, and the names of the persons claiming the estate, if any such are known to claim, and the facts or circumstances in consequence of which such estate is claimed to have escheated, praying for a writ of possession for the same in behalf of the state.

Art. 1823. The clerk of the court shall issue citation, as in

other civil causes, for such of the defendants as shall be alleged in the petition to hold possession of or claim such estate, requiring them to appear and answer at the next term of court.

ART. 1824. The clerk shall also issue a citation, setting forth briefly the contents of the petition, *for all persons interested in the estate to appear and answer* at the next term of court, which citation shall be published as required in other civil suits.

ART. 1825. All persons named in such petition as tenants or persons in actual possession or claimants of the estate may appear and plead to such proceedings, and may traverse the facts stated in the petition, or the title of the state to the lands and tenements therein mentioned, as in civil cases, and any other person claiming an interest in such estate may appear and be made a defendant and plead as in other cases.

ART. 1826. If no person, after notice as aforesaid, shall appear and plead within the time prescribed by law, then judgment shall be rendered by default in behalf of the state.

ART. 1827. If any person appear and deny the title set up by the state, or traverse any material fact in the petition, issue shall be made up and tried as other issues of facts; and a survey may be ordered, as in other cases where the titles or boundaries of land are drawn in question.

ART. 1828. If after the issue and trial it appears from the facts found or admitted that the state has good title to the estate, real or personal, in the petition mentioned, or any part thereof, *judgment shall be rendered that the state shall be seized or possessed thereof*, and at the discretion of the court recover costs against the defendants; provided, that whenever judgment is rendered in favor of the state, whether by default or after trial upon its merits, a writ of possession shall be awarded as in other civil suits.

ART. 1829. If it appears that the state has no title in such estate the defendant shall recover his costs, to be taxed and certified by the clerk; and the comptroller of public accounts shall, on such certificate being filed in his office, issue a warrant therefor on the treasury, which shall be paid as other demands on the treasury.

ART. 1830. When any judgment shall be rendered that the state be seized or possessed of any estate, *such judgment* shall contain a description thereof, and *shall vest the title in the state.*

VERMONT.

STATUTES, 1894.

[Chapter 125.]

SECT. 2549. When a person dies intestate, seized of real or personal property in this state, leaving no heir or person by law entitled to the same, the selectmen of the town where the deceased last resided, if he was an inhabitant of the state, or of the town in which he had estate, if he resided out of the state, may, in behalf of the town, file a petition with the probate court of the same district for an inquisition in the premises; and the probate court shall thereupon appoint a time and place of hearing and deciding on such petition, and cause a notice thereof to be published in some newspaper printed in the state of which the deceased was last an inhabitant, if within the United States; if not, in some newspaper printed in this state.

SECT. 2550. The notice shall recite the substance of the facts and request set forth in the petition, and the time and place at which persons claiming the estate may appear and be heard before the court, and shall be published at least six weeks successively, the last of which publications shall be at least six months before the time appointed by the court for making the inquisition.

SECT. 2551. If no sufficient cause is shown to the contrary, at the time appointed for that purpose, the court shall order and decree, that the estate of the deceased in the state, after the payment of just debts and charges, shall escheat; and shall assign the personal estate to the town where he was last an inhabitant in the state, and the real estate to the towns in which the same is situated. If he was never an inhabitant of the state, the whole estate shall be assigned to the towns where the same is located. Such estate shall be for the use of schools in the towns respectively, and shall be managed and disposed of like other property appropriated to the use of schools.

VIRGINIA.

CODE, 1887.

SECT. 2400. *Recovery by State of Property Derelict.* — The residuum of a decedent's estate, belonging to the Commonwealth, and any property derelict, or having no rightful owner, may be recovered from any person in possession thereof by a bill in equity in the name of the Commonwealth.

SECT. 2401. *Publication of Suit; what to state and require.* — When any such suit is instituted, the court shall cause a publication to be made for three months in some newspaper printed in the

city of Richmond and in the city of Washington, setting forth the nature of the claim, the name and nativity (where known) of the deceased person, or of the former owner of the property, if known, as the case may be, and describing the property or estate, and *requiring all persons claiming an interest therein* to appear and make themselves defendants by a given day of an ensuing term.

Sect. 2402. *Decree of the Court.* — If no person appear and show title in himself, the court shall decree the residuum or other property to the Commonwealth, and enforce the collection thereof, or of the proceeds of the sale of such property.

WASHINGTON.

Ballinger's Annotated Codes and Statutes.

Sect. 5557. *Who may bring Actions for.* — When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, an action may be maintained by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for sale of such property, or a part of it, if it appear that a partition cannot be made without prejudice to the owners.

Sect. 5558. *All Known Interest must be stated in Complaint.* — The interest of all persons in the property shall be set forth in the complaint specifically and particularly, as far as known to the plaintiff, and if one or more of the parties, or the share or quantity of interest of any of the parties be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact shall be set forth in the complaint.

Sect. 5560. *Notice.* — The notice shall be directed by name to all the tenants in common who are known, and in the same manner to all lien creditors who are made parties to the suit, *and generally to all persons unknown having or claiming an interest or estate in the property.*

Sect. 5561. *Service by Publication.* — If a party having a share or interest in or lien upon the property be unknown, or either of the known parties reside out of the state, or cannot be found therein, and such fact be made to appear by affidavit, the notice may be served by publication, as in ordinary cases. When service is made by publication, the notice must contain a brief description of the property which is the subject of the suit.

Sect. 5066. *Report of Referees; Confirmation; Decree.* — The

court may confirm or set aside the report in whole or in part, and if necessary, appoint new referees. Upon the report being confirmed, a decree shall be entered that such partition be effectual forever, which decree shall be binding and conclusive, —

1. On all parties named therein, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder, or inheritance of such property, or any part thereof, after the termination of a particular estate therein, or who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life;

2. On all persons interested in the property, to whom notice shall have been given by publication;

3. On all other persons claiming from or through such parties or persons, or either of them.

WEST VIRGINIA.

CODE, 1891 (3D ED.).

[Chapter 79.]

SECT. 1. *Partition of Lands.* — Tenants in common, joint tenants and coparceners, shall be compellable to make partition, and the circuit court of the county wherein the estate, or any part thereof, may be, shall have jurisdiction, in cases of partition, and in the exercise of such jurisdiction, may take cognizance of all questions of law affecting the legal title, that may arise in any proceedings.

SECT. 4. If the name or share of any person interested in the subject of the partition be unknown, so much as is known in relation thereto shall be stated in the bill.

[Chapter 124.]

SECT. 11. On affidavit that a defendant is not a resident of this state, or that diligence has been used by or on behalf of the plaintiff to ascertain in what county he is, without effect; or that process, directed to the officer of the county in which he resides or is, has been twice delivered to such officer more than ten days before the return day, and been returned without being executed; or that the defendant is a corporation, and that no person can be found in the county upon whom the process can be legally served, an order of publication may be entered against such defendant. And in any suit in equity, where the bill states that the names of any persons interested in the subject to be divided or disposed of are

unknown, and make such persons defendants *by the general description of parties unknown*, on affidavit of the fact that the said names are unknown, an order of publication may be entered *against such unknown parties*. Any order under this section may be entered either in court or at the rules. In a proceeding by petition, there may be an order of publication in like manner as in a suit in equity.

Sect. 12. Every order of publication shall state briefly the object of the suit, and require the defendants against whom it was entered, or the unknown parties to appear within one month after the date of the first publication thereof and do what is necessary to protect their interests. It shall be published once a week for four successive weeks in some newspaper published in the county in which the order is made or directed, if one is so published, unless the circuit court of such county otherwise order; and if no newspaper be published in the county, then in such other newspaper as the court may prescribe; or if none is so prescribed, as the clerk may direct. It shall be deemed to have been duly published on the date of the fourth publication thereof. It shall also be posted at the front door of the court house of the county wherein the court is held, at least twenty days before judgment or decree is rendered.

[Chapter 42.]

Sect. 6. *Notice of the Application.** — Of such application ten days' notice shall be served on the said owners, claimants and persons holding liens, and the notice may be given either before the application is presented or afterwards. But where the owners of all or any part of the real estate proposed to be taken, or the persons holding such liens or conflicting claims, or any of them, are not in the county or are unknown to the applicant, the notice as to them, instead of being thus served, may be given by advertisement containing (by reference to a plat filed for the purpose in the office of the clerk of the circuit court or otherwise) a specific description of the property in which they are interested that is proposed to be taken, and stating the purpose to which it is intended to be appropriated, and the time and place at which a hearing will be asked for upon the said application, which advertisement must be published at least once a week for four weeks successively in some newspaper printed in the county; or if none be printed therein, then in some newspaper of general circulation in the county; and must also be posted at the front door of the court house of the county, four weeks at least before the hearing.

* In proceedings to take land by right of eminent domain.

SECT. 7. *Parties under Disability or Unknown.* — If an owner or person holding such lien or claim be under disability and there be a guardian or committee for him, such guardian or committee shall be notified; but if there be no guardian or committee or if any such owner or person be unknown, the court shall appoint a guardian ad litem to defend their respective interests, and may direct the expense of such guardian ad litem, including a reasonable docket fee, to be fixed by the court, but not to exceed twenty dollars, to be taxed in the costs and paid by the applicant.

WISCONSIN.

SANBORN AND BERRYMAN'S ANNOTATION, 1898.

SECT. 3102. *Complaint; Parties.* — The complaint in such action shall particularly describe the lands sought to be partitioned and shall set forth the rights and titles of all persons interested therein, so far as the same are known to the plaintiff, including the interest of any tenant for years, for life, by the curtesy or in dower and of the persons and title to the reversion, remainder or inheritance, after the termination of any particular estate therein; and of every person who by any contingency, contained in any devise, grant or otherwise, or as having inchoate right of dower may be or become entitled to any beneficial interest in the premises; but in case any such person or his share or interest be unknown to the plaintiff, or be uncertain or contingent, or the ownership or the inheritance shall depend upon an executory devise, or the remainder shall be a contingent remainder, so that such person or his interest cannot be named or set forth, the same shall be stated in the complaint; but no person whose title or interest appears of record or who is in the actual possession or occupancy of any of such lands shall be considered or proceeded against as an unknown owner. The complaint shall demand judgment for a partition of the premises according to the respective rights of the parties interested therein and for a sale thereof, if it shall appear that partition of the land cannot be made without great prejudice to the owners thereof; and when the complaint does not pray partition of all the lands owned by the parties either of them may have the complaint so amended as to affect all the lands so owned. Every person having an interest as aforesaid, whether in possession or otherwise, and every person entitled to dower in such premises, if the same has not been admeasured, may be made a party to such action.

SECT. 3116. *Confirmation of Report; Judgment Conclusive.* — Notice of the application to confirm said report shall be given to

all the parties that have appeared, and upon confirmation thereof judgment shall be entered that the partition so ordered and made be firm and effectual forever, and such judgment shall be final and conclusive:

1. On all the parties to such action and their legal representatives, except as hereinbefore provided and as provided in the next section.

2. On all persons interested in the premises who may be unknown, who shall be served in such action as provided by law.

3. On all persons claiming or to claim from such parties or persons or either of them, subsequent to the filing of the notice of the pendency of the action.

A copy of such report and judgment, certified to be such in the manner required by law to make them evidence, shall be recorded in each county in which any part of the premises are situated, and the expense of such copy and record shall be taxed in the costs.

Sect. 3186. *Action to quiet Title, who may bring; Pleading; Evidence; Summons.* — Any person having the legal title to land may institute an action against any other person setting up a claim thereto, and if the plaintiff shall be able to substantiate his title the defendant shall be adjudged to release to him all claim to such land and pay the costs of such action, unless the defendant shall, by answer, disclaim all title to such land and give a release thereof to the plaintiff, in which case he shall recover costs, unless the court shall otherwise order. It shall be sufficient to aver in the complaint in such action the nature and extent of the plaintiff's estate in such land, describing it as accurately as may be, that he is in possession thereof or that said land is vacant and unoccupied, and that the defendant makes some claim thereto, and to demand judgment that the plaintiff's claim be established against any claim of the defendant, and that he be forever barred against having or claiming any right or title to the land adverse to the plaintiff; and the defendant, if he do not so disclaim and release, may answer any matter in denial of the plaintiff's claim, title or possession, or which, if proved, will establish his own, and judgment shall be rendered according to the rights of the parties. In all cases where it may be necessary for the plaintiff to offer proof that the defendant is setting up or making some claim to said land the introduction in evidence of any instrument in writing, theretofore at any time appearing of record, or of the record thereof or of a duly certified copy of such record, purporting to convey to or otherwise in any way to affect in favor of the defendant, or any grantor, devisor, ancestor or other assignor of the defendant said land or any interest therein adversely to the plaintiff, or under or through

which the plaintiff does not trace his claim of title, shall be sufficient proof of the making or setting up of such claim of title on the part of the defendant; and the court may, in any case, receive any other competent evidence tending to establish the fact of the making or setting up of claim on his part. *In any such action where a person* or persons *is* or are *made a party* by a fictitious name, or *as an unknown owner, heir, grantee, representative or other like designation* the plaintiff shall give in a note at the foot of the summons a brief description of the premises affected thereby. And any person not having such title or possession, but being the owner and holder of any lien or incumbrance on land, shall also have the same right of action as the owner in fee to test the legality and validity of any other claim, lien or incumbrance on such land or any part thereof.

SECT. 3196. *Action against Unknown Owner.* — In any action relative to real estate if any person who is a necessary or proper party thereto is unknown he may be proceeded against and made a party thereto *as an unknown owner*, and the summons may be served upon him as is provided by law for service of a summons upon unknown owners, but no person whose title or interest appears of record or who is in actual possession or occupancy of such real estate shall be considered or proceeded against as an unknown owner.

SECT. 2612. *Suing Party by Fictitious Name; Unknown Partners' Names.* — Where the plaintiff is ignorant of the name or a part of the name of any defendant, or when any person who may be a proper party defendant to an action to establish or enforce, redeem from or discharge a lien or claim to any real or personal property in this state as heir, grantee, legal representative or otherwise is unknown to the plaintiff, such defendant or person may be designated a defendant by so much of the name as is known, or by a fictitious name, *or as an unknown heir, representative, owner or person*, as the case may require, *adding such description as may reasonably indicate the person intended*, and such person shall be regarded a defendant in the action and as sufficiently described therein for all the purposes thereof, including service of the summons, as upon an absent defendant or otherwise, appointment of guardian, if an infant, and liability to be bound by the proceedings, orders and judgments therein. When the true name of the person of such defendant is ascertained the process, pleadings and all proceedings whatever may be amended by an order directing the insertion of the true name instead of the designation employed. In actions or proceedings against a partnership, where the names of the several members of the partnership are unknown

to the plaintiff, all proceedings may be in the partnership name until the names of the several partners are ascertained, whereupon the process, pleadings and all proceedings shall be amended by an order directing the insertion of such names, and the subsequent proceedings shall be therein.

Sect. 1197. *Actions, when barred.* — The grantee named in any deed made by a county clerk or the treasurer of any incorporated city or village on the sale of lands for the non-payment of taxes as provided by law, his heirs, executors, administrators or assigns may, at any time within three years after the date of such conveyance, commence an action against the person or persons owning the lands described in such conveyance at the time of making the sale upon which such conveyance was made, or any parcel thereof or interest therein or against any person or persons claiming under such owner or owners, for the purpose of barring such former owner or owners and those claiming under them of all right, title, interest or claim in such lands; but no such action shall be commenced on any such deed issued in lieu of a void, informal or insufficient deed unless the same be commenced within three years after the date of such void, informal or insufficient deed.

Sect. 1208. *Unknown Owners, Minors, Idiots, etc.* — If the plaintiff in such action * cannot ascertain who are the proper persons to make defendants as to any tract or parcel of land described in his complaint he may allege the fact in his complaint and they may be proceeded against as non-resident defendants *and shall be described in the proceedings as unknown owners;* but no judgment rendered against such unknown owners shall affect the right, title or interest of any minor, idiot or insane person whose right of redemption had not expired at the time of the commencement of such action.

WYOMING.

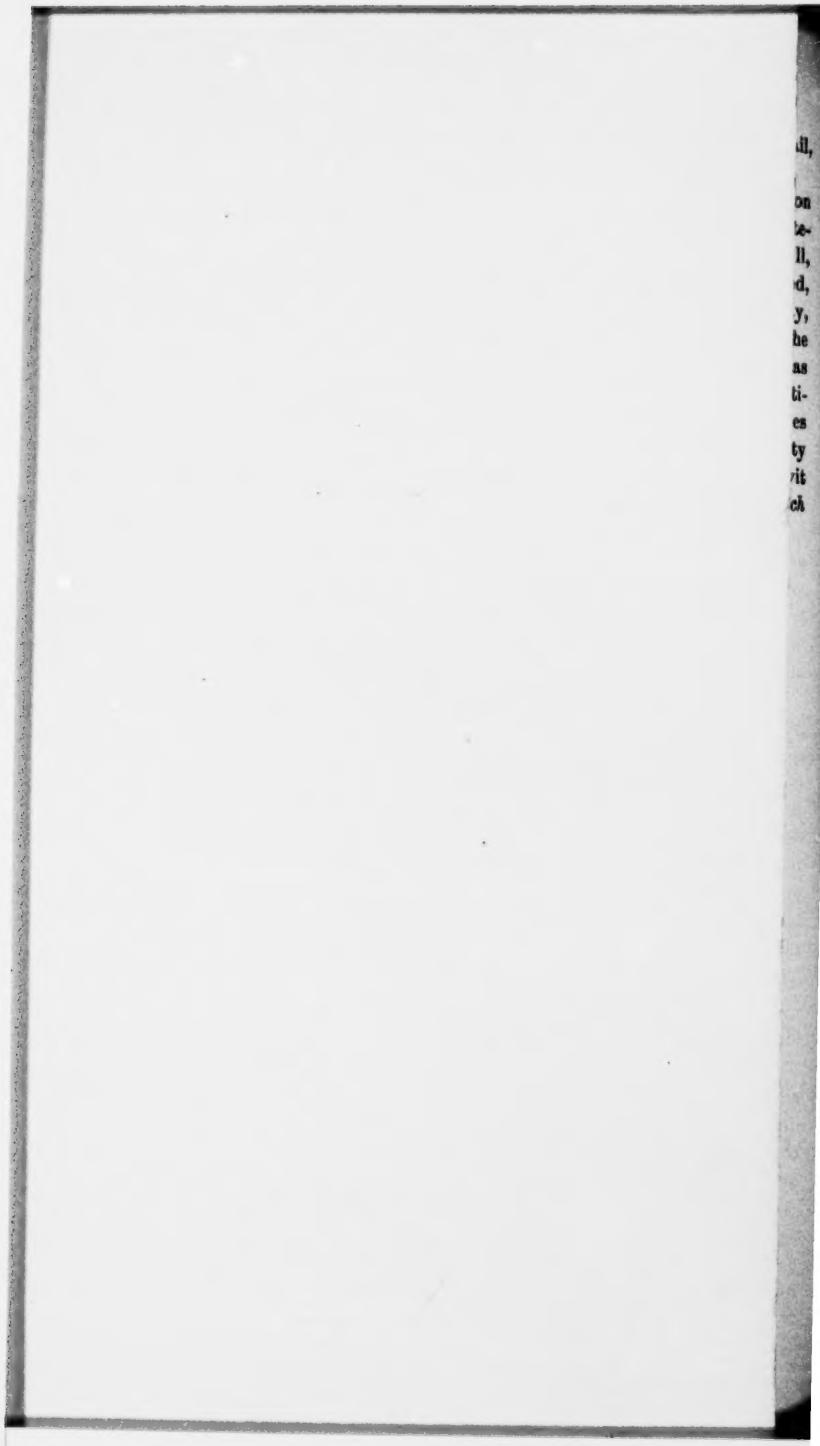
Revised Statutes, 1887.

Sect. 3009. *Who may obtain Sale.* — District courts in an action by the tenant in tail, or for life, or by the grantee or devisee of a qualified or conditional fee, or of any other qualified, conditional, or determinable interest, or by a person claiming under such tenant, grantee, or devisee, or by the trustees or beneficiaries, if the estate is held in trust, may authorize the sale of any estate, whether the same was created by will, deed or contract, or came by descent, when satisfied that a sale thereof would be for the benefit of the person holding the first and present estate,

* Actions under section 1197.

interest, or use, and do no substantial injury to the heirs in tail, or others in expectancy, succession, reversion, or remainder.

SECT. 3010. *Requisites of Petition; Parties.* — The petition shall contain a description of the estate to be sold, a clear statement of the interest of the plaintiff therein, and a copy of the will, deed, or other instrument of writing by which the estate is created, all persons in being who are interested in the estate, or who may, by the terms of the will, deed, or other instrument, creating the entailment or other estate, thereafter become interested therein as heir, reversioner, or otherwise, shall be made parties to the petition; and if the names of any persons who ought to be made parties are unknown to the plaintiff, or if the residence of any such party is unknown to the plaintiff, the fact shall be verified by the affidavit of the plaintiff, *and the sale may be ordered notwithstanding such names and residences are unknown.*



Office Supreme Court U.S.
FILED
OCT 24 1900
JAMES H. McKENNEY,
Clerk.

No. 213.

Supp. Brf. of Knowlton & Hammond for D. C.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Oct. 24, 1900.

No. 213.

WILLIAM B. TYLER, PLAINTIFF IN ERROR,

vs.

THE JUDGES OF THE COURT OF REGISTRATION.

SUPPLEMENTAL BRIEF FOR THE DEFENDANTS IN ERROR.

HOSEA M. KNOWLTON,
Attorney General of Massachusetts.
FRANKLIN T. HAMMOND,
Assistant Attorney General of Massachusetts,
Counsel for Defendants in Error.

(17,656.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10-24-1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 213.

WILLIAM B. TYLER, PLAINTIFF IN ERROR,

vs.

THE JUDGES OF THE COURT OF REGISTRATION, DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR THE DEFENDANTS IN ERROR.

The defendants in error, with the permission of the court, beg to submit the following brief in reply to the brief of the plaintiff in error:

I.

There are certain inaccuracies in the brief for the plaintiff in error which the defendants in error deem it important to call to the attention of the court; for it is upon these inaccuracies that the plaintiff in error bases a material portion of his argument.

(*a.*) He assumes that under the Massachusetts Act there is no real judicial proceeding; that nothing comes before the court but the *ex parte* statements of the applicant, and the mere opinion of the examiner that the title is or is not proper for registration, unaccompanied by any statement of facts, abstract of title, or other evidence.

The plaintiff in error, not finding the familiar conveyancing term "abstract" in the Land Registration Act, and misconstruing the equivalent expression "report," states as a fact (page 24 of his brief) that under the Act and *in the present case*—

"The examiner * * * reports to the court, not the details of his examination, but only his opinion upon the result. In the present case he merely found the title of record to be good." * * *

"There is no abstract of title or indication of any details relating to it, by which the accuracy of his examination may be verified, or by which the correctness of his opinion may be judged. * * * There is no real trial and nothing comes before the judge, except what is stated in the application, and in the opinion of the examiner, *and the decree is pronounced upon that alone.* The examiner thus becomes the real judge, and the only security for the protection of adverse interests."

And on page 25:

"The judge acts only upon what is laid before him, and without knowledge of the facts, and without having the question brought to his attention."

This is absolutely inaccurate. It is not in accord with the requirements of the statute, the general practice, or the facts in this case. The act calls for the filing by the examiner of his *report*, "concluding with his opinion upon the title." This "report" is what conveyancers call an "abstract of

title." It is a full abstract of the entire record title, and it concludes with the examiner's opinion. As a matter of fact, such abstract of title was filed in this case, and is filed in every case, and is carefully revised by the court before a decree is pronounced. The record shows (p. 13) that such report (or "abstract") was filed, but as a certified copy of it would be entirely immaterial to the issues in this case, cumbersome to the record, and absurd to print, it was omitted from the record.

His argument assumes that the court is not a court of justice, and that no provisions or proceedings are made by its judges to insure a judicial examination of title by the party most interested to see that no mistake shall be made, namely, the Commonwealth. He admits (p. 27) that "there are not so many adverse claims that cannot be ascertained, as it is sometimes assumed," and that "in an examination of title conducted on behalf of those whose interest it is that no mistake shall be made, it is rare that any possible adverse claim remains undiscovered," and that the experience of title insurance companies shows this. But he implies that no effort is made whatsoever to discover adverse claims, it being nobody's interest to do so.

The whole purpose of an official examination is to discover adverse claims. The examination is conducted by conveyancers appointed by the judge, who are precisely the same conveyancers who conduct examinations on behalf of those same title insurance companies. The examination is made under much better circumstances and much greater effort is expended to ascertain adverse claims than has ever before been possible.

(*b.*) The plaintiff in error states that the provisions for application *and notice* in the Massachusetts Act are similar to the provisions in the Ohio Act (pp. 7, 10, and 18 of his brief), and he quotes from the Ohio decision (State *vs.* Guilbert) "only those who are named in the application are required to be served, even in this manner."

This is not only not true, but, on the contrary, is the essential respect in which the Massachusetts Act differs from the Ohio Act. Under the Ohio Act only persons named by the applicant received notice, and they were notified, not by the court, but by the applicant himself; neither was there any judicial examination of the title. Under the Massachusetts Act official notice is served by the recorder of the court, not by a party; is served upon all parties who appear either from the applicant's statement or from the examiner's report or opinion to have any possible claim; the court may at any time order such further notice as it may deem proper, and the judges, by the terms of the amendment of 1900, are obliged to see that *actual notice* is given not only when practicable, but *when possible;* and the Massachusetts supreme court, whose decision on this point is final, in construing the Act has held that "the notice is required to name all persons known to have an adverse interest, and this, of course, includes any adverse claim, whether admitted or denied, that may have been *discovered by the examiner* or in any way found to exist" (p. 33 of the Record).

II.

The plaintiff argues (p. 9 *et seq.*) that a person interested in the proceedings for initial registration has the constitutional right to actual notice and an opportunity to be heard;

and that he cannot be constitutionally concluded by a decree in proceedings of which he has no actual notice. He says (p. 13) that it is recognized in unambiguous terms in Hagar *vs.* Reclamation District, 111 U. S., p. 708, and Iowa Central Railway Company *vs.* Iowa, 160 U. S., p. 393, that a right to *notice* and an opportunity to be heard are fundamental rights, secured by the requirement of due process, where life or liberty or the title of property is involved.

If what is here said is true, then the practice prevailing in Massachusetts of serving summons upon residents by leaving a copy at the last and usual place of abode is an unconstitutional method of service, unless the copy actually is received by the party to which it is directed. Nevertheless, it has always been considered good service, has been provided for by statute, and, as the court below said (Record, p. 37), "It (the summons) may be served on residents by leaving a copy at the last and usual place of abode."

If the plaintiff's point is well taken that notice must be received before a valid decree can be entered, then the decision of this court in Arndt *vs.* Griggs was put upon an entirely erroneous ground, because that case recognized the validity of notice by publication, whether or not the notice actually came home to the party interested. It will not do to attempt to distinguish this case, as the plaintiff does, by saying that non-residents may be concluded, whether they receive notice or not. If the receipt of actual notice before the entry of a conclusive decree is a fundamental right, then a non-resident is as much entitled to receive it as a resident, and the justification of the validity of service by publication should be, not that the person to be affected is a

non-resident, but that he cannot be actually notified. Usually, however, a non-resident can be actually notified, in the sense that he can be made to receive notice quite as effectually as a resident, but the validity of service upon him by publication does not depend upon the fact whether he can be actually notified or not.

The real fact is that the word "notice" is frequently used in two different senses. It may be used to express the fact that news of the proceedings is sent, or to express the fact that such news is received. It depends upon whether regard be had to the point of view of the person sending or to that of the person receiving the news. The plaintiff argues that the constitutional right to notice is the right to receive notice, but the cases all assume that this right to notice is a right to have such notice sent out as is likely to be received. For instance, Arndt *vs.* Griggs decides that for the purpose of determining the title of a non-resident to land within the State "The State may provide any reasonable methods of imparting notice." This plainly refers to the notice to be sent. If notice was required to be received, then there would not be any reasonable method of imparting notice, except one resulting in its actual receipt. To illustrate the way in which the plaintiff confuses these two meanings, we quote the following from his brief (p. 10):

> "To all persons adversely interested that do not receive actual notice of the proceedings, there is no process of law or notice whatever, except the advertisement in a newspaper addressed, 'To all whom it may concern.' The question is, in the first place, whether this is a sufficient process where the persons to be concluded by the decree are known and within the jurisdiction and can be actually served with notice."

This is merely saying that if notice means the receipt of news, there is no notice when the news is not received; but he fails to state that notice is given in the sense that news is sent out, not only by publication but by posting on the land and by registered mail. This is notice, whether it comes home to the party interested or not.

And it should further be noted, as above, that the amendment of 1900 provides for *actual* notice on both resident and non-resident when possible.

III.

The Illinois method of clearing titles is referred to by the plaintiff in error as indicating the way in which registration of title is practicable. This method is utterly inadequate. The Illinois act (Laws of 1897, p. 141) provides (section 28) that the decree of registration is not conclusive against persons entitled to future interests in land until the expiration of one year after those interests take effect in possession, which may be twenty-one years after any life in being. Until the expiration of that time, therefore, a certificate of title under the Illinois act is worth no more than the certificate of the examiner who examines a title.

IV.

Finally, it should be noted that although the plaintiff in error states (p. 23) that the amendments to the act are applicable to these proceedings, the copy of the act printed as an appendix to his brief is not, as it purports to be, a full copy of the provisions of the act.

See amendments omitted to sections 2, 3, 12, 13, 19, 27, and 58.

The copy printed as an appendix to the brief of the defendants in error is a full copy of the act as it exists today.

HOSEA M. KNOWLTON,
Attorney General of Massachusetts.
FRANKLIN T. HAMMOND,
Assistant Attorney General of Massachusetts.

(17656.)

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 213.

WILLIAM B. TYLER, *Plaintiff in Error*,

v.

THE JUDGES OF THE COURT OF REGISTRATION.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

SUPPLEMENTAL BRIEF FOR THE DEFENDANTS IN ERROR.

HOSEA M. KNOWLTON,
Attorney-General.

FRANKLIN T. HAMMOND,
Assistant Attorney-General.

2373

(17656.)

Supreme Court of the United States.

October Term, 1900.

No. 213.

WILLIAM B. TYLER, Plaintiff in Error,

v.

THE JUDGES OF THE COURT OF REGISTRATION.

SUPPLEMENTAL BRIEF FOR THE DEFENDANTS IN ERROR.

I.

The power of this court to review the decree of the court below depends upon United States Revised Statutes, § 709, which is as follows: —

"A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission

held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission or authority may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

"The Supreme Court may reverse, modify or affirm the judgment or decree of such state court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."

It is contended that in the present case there is drawn in question the validity of a statute of the Commonwealth of Massachusetts on the ground of its being repugnant to the Constitution of the United States, and, the decision of the state court having been in favor of its validity, that this court has power to re-examine such decision.

This court has frequently defined what it is to draw in question the validity of a statute.

In *Baltimore & Potomac Railroad* v. *Hopkins*, 130 U. S. 210, 224, Mr. Chief Justice Fuller said: "Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise."

In *United States* v. *Lynch*, 137 U. S. 280, 285, the court, speaking through the same judge, said: "The validity of a statute, or the validity of an authority, is drawn in question when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry."

See also *Miller* v. *Cornwall Railroad Co.*, 168 U. S. 131, 133.

It is not necessary to the jurisdiction of this court that the validity of a state statute be drawn in question by a plaintiff in error who claims to have been deprived by the decision of the lower court of a right or immunity derived from the

clause of the Federal Constitution, to which he alleges the statute in question to be repugnant. It is sufficient if the statute in its necessary intendment and operation is claimed to be invalid because violative of rights secured to others by the Constitution, even if in the particular case in which the question is raised the plaintiff in error suffers no deprivation of such rights.

In this connection it is vitally important to distinguish between two of the three categories within which a suit must come in order to warrant the exercise of the jurisdiction of this court under Rev. Sts., § 709. The categories are stated by Mr. Justice Swayne in *Home Insurance Company* v. *City Council*, 93 U. S. 116, 121, as follows: —

"Where a judgment or decree is brought to this court by a writ of error to a state court for review, the case to warrant the exercise of jurisdiction on our part must come within one of three categories: —

"1. There must have been drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, and the decision must have been against the claim which either was relied upon to maintain.

"2. Or there must have been drawn in question a statute of, or authority exercised under, a state upon the ground of repugnance to the Constitution or a law or treaty of the United States, and the decision must have been in favor of the validity of the state law or authority in question.

"3. Or a right must have been claimed under the Constitution or a treaty or law of, or by virtue of a commission held or authority exercised under, the United States, and the decision must have been against the right so claimed."

It is true that in the class of cases included within the third category above described this court will not entertain jurisdiction unless the right claimed under the Constitution, treaty, statute or authority of the United States is asserted by a plaintiff in error who claims the right or title for himself.

"It is well settled that in order to give this court jurisdiction to review a judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must

be one of the plaintiff in error, and not of a third person only." Gray, J., in *Giles* v. *Little*, 134 U. S. 645, 650.

See also *Long* v. *Converse*, 91 U. S. 105.
Montgomery v. *Hernandez*, 12 Wheat. 129, 132.
Ludeling v. *Chaffe*, 143 U. S. 301.
Miller v. *Lancaster Bank*, 106 U. S. 542.
Conde v. *New York*, 168 U. S. 642.

This court has several times applied this principle in cases of ejectment where the defendant set up an outstanding title in a third person under a treaty of the United States. In these cases it has held that it has no power to review the decree of a state court because the statute (Rev. Sts. § 709) was intended to protect the person who "set up or claimed" the title for himself, and not to protect a person claiming no title for himself under the treaty.

Owings v. *Norwood's Lessee*, 5 Cranch, 344.
Henderson v. *Tennessee*, 10 How. 311.
Hale v. *Gaines*, 22 How. 144, 160.

But this principle depends upon the peculiar language of that part of the statute which relates to rights or immunities claimed under the Constitution, treaties, statutes or authority of the United States, the act requiring that the decision should be against such title or right "specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority." The phrase quoted does not qualify the preceding clauses of the statute relating to suits in which the validity of treaties, or statutes of, or authorities exercised under, the United States, or statutes of or authorities exercised under any of the states, is drawn in question. The two categories of cases are quite distinct, and the requirement that the right or immunity claimed to be denied must be a right belonging to the plaintiff in error, applies only to the third category mentioned above. This proposition is asserted after an extended examination of the decisions of this court which has resulted in the failure to find any case in which it has held that the requirement above named applies to a case in which the validity of a statute of a state is drawn in question. In all

of the cases supporting the proposition that the plaintiff in error in order to be entitled to resort to this court must claim a right or title of his own under the Constitution or a treaty or law of the United States, which, he asserts, the judgment of a state court denies to him, there was no question of the validity of any statute.

But a case may come within two of these categories. Such a case was *Home Insurance Co. v. City Council*, 93 U. S. 116, 121, where an authority exercised by the city council under the state and in pursuance of a tax ordinance was drawn in question, on the ground of its being repugnant to the Federal Constitution, and a right was also claimed under the Federal Constitution. It was there held that the case was within two of the categories above named.

The fact that the validity of the statute involved in this case is drawn in question as being repugnant to a provision of the Constitution, which not only forbids legislation against its provisions, but also invalidates any action of the judicial or executive departments of a state government violating its provisions, and therefore may itself give affirmative rights and immunities, is not material. In the present case the plaintiff in error does not rely upon any such rights or immunities, but merely draws in question the validity of the act.

II.

The present case is a petition for a writ of prohibition to restrain the defendants in error from entertaining an application for registration of title to land. The only question involved is that of the jurisdiction of the Massachusetts Court of Land Registration.

In re Morrison, 147 U. S. 14, 33.
In re Cooper, 143 U. S. 472, 495.

The plaintiff is the owner of land adjoining the land the title to which is sought to be registered, and the boundaries of which are sought to be determined. He is, therefore, a party interested in the proceedings, and his rights will be adjudicated upon by determining the boundary between his land and the land of the applicant, if the court has jurisdic-

tion. He asserted below and still asserts that the Court of Land Registration has no jurisdiction because the entire statute under which it is created is repugnant to the Federal Constitution. The court below has entered a final decree in favor of the validity of the statute. The case, therefore, necessarily turns upon the question of the validity of this statute which is directly drawn in question.

It is immaterial that after final judgment by the Court of Land Registration the petitioner may have a remedy by appeal. In a case where a writ of prohibition was sought to restrain county commissioners from proceeding to assess damages for the taking of land under a statute alleged to be unconstitutional (*Connecticut River Railroad Co.* v. *County Commissioners*, 127 Mass. 50), Mr. Chief Justice Gray said (p. 59):—

"In the present case, if the proceedings for the assessment of damages had gone on to final judgment they might indeed have been quashed by writ of certiorari. But the fact that the remedy by petition for writ of certiorari will be open to the land owner after final judgment affords no reason why the court should now refuse a writ of prohibition and thereby put the petitioner to the trouble, expense and delay of a trial before a tribunal which has no jurisdiction of the case, and to whose jurisdiction the petitioner has objected at the outset of the proceedings."

III.

It is impossible to support the statute against the plaintiff so as to declare its validity in authorizing a judgment binding upon him without also supporting the authority which the statute gives to the court to enter a judgment binding upon all persons interested. If this court is of the opinion that the provisions of the statute, providing that the decree of original registration shall bind every one interested, are invalid as to certain persons but valid as to others, then the entire statute is invalid. The essential purpose of the provisions making the decree of registration conclusive against all the world is to render the title so declared indefeasible, because based upon a decree importing absolute verity. If

there are any persons who are not concluded by the decree the certificate of title cannot be given the effect which the statute declares that it shall have, to wit: that it shall be "received as evidence in all the courts of the Commonwealth, and shall be conclusive as to all matters contained therein except so far as otherwise provided" (§ 47); that every applicant receiving a certificate of title "shall hold the same free from all incumbrances except those noted on the certificate" and certain enumerated rights (§ 39); and that the decree of registration "shall be conclusive upon and against all persons, including the Commonwealth, whether mentioned by name in the application, notice or citation, or included in the general description 'to all whom it may concern'" (§ 38).

One of the essential features of the system of land transfer embodied in this statute is that the title is conclusively declared once for all by a judicial proceeding, establishing and confirming it absolutely and against all the world, after the most complete and general notice possible. It is a necessity, and, indeed, the life of the system, that all persons should be concluded by the decree. To hold otherwise would be to make a law which the Legislature of Massachusetts never intended to enact.

In *Poindexter* v. *Greenhow*, 114, U. S. 270, 304, the court, through Mr. Justice Matthews, said: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional and another be declared inoperative and void because unconstitutional, but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforceable, even if the other part should fall. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

In *Spraigue* v. *Thompson*, 118 U. S. 90, 95, where it was urged that certain illegal exceptions in a section of the statute might be disregarded, but that the rest could stand, the same eminent judge said: "The insuperable difficulty to

the application of that principle of construction to the present instance is that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

In *United States* v. *Rees*, 92, U. S. 214, the question raised was whether a penal statute enacted by Congress which was broad enough to punish wrongful acts without, as well as within, the constitutional jurisdiction, could be limited by a judicial construction so as to make it operate only on that which Congress might rightfully prohibit and punish. It was held that this court had no power so to limit the statute; that the language of it was so plain that there was no room for construction; and that to limit it to a particular class when it was expressly declared to be general would be to make a new law and not to enforce an old one.

In the *Trade-mark Cases*, 100 U. S. 82, there was drawn in question the validity of an act of Congress regulating trade-marks, which was not limited in terms to their use in commerce with foreign nations and among the states, but was intended to embrace all commerce, including that between citizens of the same state. It was suggested that if Congress might regulate trade-marks used in interstate commerce, the statute should be given effect in that class of cases and no other; and that since the general description in the statute included the more limited one it might be valid to the extent of this limited portion. But it was held that "While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

See also *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S. 601, 635–6.

From these authorities it is apparent that if this court should hold the provisions of the act making the decree of registration conclusive as to all persons interested invalid, and should hold that certain persons might not be concluded by the decree of registration, then all the provisions relating to the original registration would fall, and the Court of Land Registration would have no jurisdiction over this plaintiff in error although he has been denied no rights secured by the Fourteenth Amendment.

The question is squarely raised, therefore, in this case, whether the provisions of the act making the decree of registration conclusive against all the world are valid. If there is any point as to jurisdiction which the defendants in error have the power to and may properly waive they do so, and for the reasons above given respectfully ask the court to proceed to judgment upon the merits.

Pollock v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, 554.

HOSEA M. KNOWLTON,
Attorney-General of Massachusetts.

FRANKLIN T. HAMMOND,
Assistant Attorney-General of Massachusetts.

Supreme Court of the United States.

No. 213.—October Term, 1900.

William B. Tyler, Plaintiff in Error. vs. The Judges of the Court of Registration. } In error to the Supreme Judicial Court of the Commonwealth of Massachusetts.

[December 17, 1900.]

This was a petition by Tyler to the Supreme Judicial Court of Massachusetts for a writ of prohibition to be directed to the Judges of the Court of Registration to prohibit them from further proceeding under what is known as the Torrens Act in the registration of a certain parcel of land described in the application, or in the determination of the boundary between such parcel of land and land of petitioner.

The petition alleged in substance that David E. Gould and George H. Jones, on December 22, 1898, applied to the Court of Land Registration to have certain land in the county of Middlesex brought under the operation and provisions of the Land Registration Act, and to have their title thereto registered and confirmed. The land referred to was shown on a plan filed with the application. The petitioner, who was the owner of an estate in fee simple in a parcel of land adjoining part of the land described in the application, insisted that the boundary line between his land and the part aforesaid was not correctly shown on the plan filed with the application, but encroached upon and included part of his land. The petition prayed for a writ of prohibition, and alleged that the Land Registration Act under which the proceedings were taken violated the provisions of the Constitution of the United States, first, in making a decree of confirmation conclusive upon persons having an interest in the land, though they may have had no notice of the proceedings for registration, and therefore would have the effect of depriving such persons of their property without due process of law, and otherwise than by the law of the land; second, that the act was also invalid in giving judicial powers to the recorder and assistant recorders therein mentioned, who were not judicial officers under the constitution of the Commonwealth, and also gave them power to deprive persons of their property without due process of law; third, that the operation of the act in other respects depended for the effect thereby intended upon the conclusiveness of the original decree of registration, and the exercise of nonjudicial powers by the recorder, &c.

Upon the petition and answer, which simply averred compliance with the terms of the act, together with the rules of the land court, &c., the

case was reserved for a full bench upon the only question raised at the hearing, namely, the constitutionality of the act. The court decided the act to be constitutional, and dismissed the petition. (175 Mass. 71.) Hence this writ of error.

Mr. Justice BROWN delivered the opinion of the Court.

The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defense set up by the party pursued. Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens.

The very first general rule laid down by Chitty (Pleading, p. 1) is that "the action should be brought in the name of the party whose legal right has been affected, against the party who committed or caused the injury, or by or against his personal representative." An action on contract (p. 2) "must be brought in the name of the party in whom the legal interest in such contract was vested;" and an action of tort (p. 69) "in the name of the person whose legal right has been affected, and who is legally interested in the property at the time the injury thereto was committed." As stated by another writer: "No one can be a party to an action if he has no interest in it. A plaintiff cannot properly sue for wrongs that do not affect him, and on the other hand, a person is not properly made a defendant to a suit upon a cause of action in which he has no interest, and as to which no relief is sought against him." In familliar illustration of this rule, the plaintiff in an action of ejectment must recover upon the strength of his own title and not upon the weakness of the defendant's, who may even show title in a third person to defeat the action.

Actions instituted in this court by writ of error to a State court are no exceptions to this rule. In order that the validity of a State statute may be "drawn in question" under the second clause of section 709 R. S., it must appear that the plaintiff in error has a right to draw it in question by reason of an interest in the litigation which has suffered, or may suffer, by the decision of the State court in favor of the validity of the statute. This principle has been announced in so many cases in this court that it may not be considered an open question.

In *Owings* v. *Norwood's Lessee*, (5 Cr. 344,) an action of ejectment, defendant set up an outstanding title in one Scarth, a British subject, who held a mortgage upon the premises. The decision of the court being adverse to Owings, he sued out a writ of error from this court, contending that Scarth's title was protected by the treaty with Great Britain. It was

held that, as the defendant claimed no right under the treaty himself, and that the right of Scarth, if he had any, was not affected by the decision of the case, the court had no jurisdiction. "If," the court said, "he [the defendant] claims nothing under a treaty, his title cannot be protected by the treaty. If Scarth or his heirs had claimed it would have been a case arising under a treaty. But neither the title of Scarth nor of any person claiming under him can be affected by the decision of this court."

In *Henderson* v. *Tennessee*, (10 How. 311,) a similar case, namely, an action of ejectment, an outstanding title in a third person, was set up by the defendant, and alleged to have been derived under a treaty. The court held that an outstanding title in a third person might be set up, and that the title set up in this case was claimed under a treaty, "but," said the court, "to give jurisdiction to this court, the party must claim for himself, and not for a third person in whose title he has no interest. . . . The heirs of Miller," who claimed under the treaty, "appear to have no interest in this suit, nor can their rights be affected by the decision." Like rulings were made under a similar state of facts in *Montgomery* v. *Hernandez*, (12 Wheat. 129;) *Hale* v. *Gaines*, (22 How. 144;) *Verden* v. *Coleman*, (1 Black, 472;) and *Long* v. *Converse*, (91 U. S. 105.)

In *Giles* v. *Little*, (134 U. S. 645,) the prior authorities are cited, and the law treated as well settled that "in order to give this court jurisdiction to review a judgment of a State court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be one of the plaintiff in error, and not of a third person only." See also *Ludeling* v. *Chaffe*, (143 U. S. 301.)

It is true that under the third clause of section 709, where a title, right, privilege or immunity is claimed under Federal law, such title, &c., must be "specially set up or claimed," and that no such provision is made as to cases within the second clause, involving the constitutionality of State statutes or authorities, but it is none the less true that the authority of such statute must "be drawn in question" by some one who has been affected by the decision of a State court in favor of its validity, and that in this particular the three clauses of the section are practically identical.

As we had occasion to observe in *California* v. *San Pablo & Tulare R. R.*, (149 U. S. 308, 314,) "the duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties, or counsel, whether

in the case before the court, or in any other case, can enlarge the power or affect the duty of the court in this regard." See also *Lord* v. *Veazie*, (8 How. 251;) *Cleveland* v. *Chamberlain*, (1 Black. 419;) *Kimball* v. *Kimball*, (174 U. S. 158.)

In the case under consideration the plaintiff in error is the owner of a lot adjoining the one which is sought to be registered, and the only question in dispute between them relates to the location of the boundary line. In his petition he does not set forth that he made himself a party to the proceedings before the Court of Registration, and his name does not even appear in the list of those who are required to be notified, or elsewhere in the proceedings before the court.

In the assignment of error he complains only of the unconstitutionality of the statute, in that it deprives persons of property without due process of law. In his brief his first objection to the validity of the act is that the registration, which deprives all persons, except the registered owner of interest in the land, is obtained as against residents and known persons only by posting notices in a conspicuous place on the land and by registered letters, and as against non-residents and unknown persons by publication in a newspaper; and that the rights of the parties may be foreclosed without actual notice to them in either case, and without actual knowledge of the proceedings. His second objection to the validity of the act is that the registration of dealings with the land after the original registration would, in certain cases, have the effect of depriving the registered owners of their property without due process of law.

His objections throughout assume that he has actual knowledge of the proceedings, and may make himself a party to them and litigate the only question, namely, of boundaries, before the Court of Registration. In other words, he is not affected by the provisions of the act of which he complains, since he has the requisite notice. Other persons, whether residents or non-residents, whose rights might be injuriously affected by the decision, might lawfully complain of the unconstitutionality of an act which would deprive them of their property without notice; but it is difficult to see how the petitioner would be affected by it. Indeed, if the act were subsequently declared to be unconstitutional, the proceedings against him would simply go for naught. He would have lost nothing, since the action of the court would simply be void, and his interest in the land would remain unaffected by its action.

It is true that his competency to institute these proceedings does not seem to have been questioned by the Supreme Court of Massachusetts. It may well have been been thought that to avoid the necessity and expense of appearing before an unconstitutional court and defending his rights there, he had sufficient interest to attack the law, which lay at the foundation of its proposed action; but to give him a *status* in this court he is bound under

his petition to show, either that he has been, or is likely to be, deprived of his property without due process of law, in violation of the Fourteenth Amendment; and as no such showing has been made, we cannot assume to decide the general question whether the Commonwealth has established a court whose jurisdiction may, as to some other person, amount to a deprivation of property. If that court shall eventually uphold his contention with respect to the boundary, he will have no ground for complaint. If he be unsuccessful, he may, under the registration act, appeal to the Superior and ultimately to the Supreme Court, whence, if it be made to appear that a right has been denied him under the Fourteenth Amendment, he may have his writ of error from this court.

Our conclusion is that the plaintiff in error has not the requisite interest to draw in question the constitutionality of this act, and that the writ of error must be

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 213.—October Term, 1900.

William B. Tyler, Plaintiff in Error, vs. The Judges of the Court of Registration. } In error to the Supreme Judicial Court of the State of Massachusetts.

[December 17, 1900.]

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Shiras, dissenting:

In order to give this court jurisdiction to review the judgment of a State court on the ground that the validity of a statute of, or an authority exercised under, any State, was drawn in question for repugnancy to the Constitution or laws of the United States, and that its validity was sustained, it is enough that a definite issue as to the validity of the statute is distinctly deducible from the record; that the State court entertained the suit; and that its judgment rested on the conclusion that the statute was valid.

The inquiry is whether the validity of the statute or authority has been drawn in question "in a suit" in the State court and a "final judgment" has been rendered in favor of its validity. If so, we have jurisdiction to review that judgment. *Weston* v. *Charleston*, 2 Peters, 449; *Wheeling & Belmont Bridge Company* v. *Wheeling Bridge Company*, 138 U. S. 287; *Luxton* v. *Bridge Co.*, 147 U. S. 337; *McPherson* v. *Blacker*, 146 U. S. 1.

Weston v. *Charleston* was an application to the State court for a writ of prohibition to restrain the levy of a tax under a city ordinance on the ground that it violated the Constitution, and went to judgment in the highest court of South Carolina sustaining the validity of the ordinance. This court held that the writ of error was properly issued, and Mr. Chief Justice Marshall said:

"The question, therefore, which was decided by the constitutional court, is the very question on which the revising power of this tribunal is to be exercised, and the only inquiry is, whether it has been decided in a case described in the section which authorizes the writ of error that has been awarded. Is a writ of prohibition a suit?"

After answering this question in the affirmative the Chief Justice thus proceeded:

"We think also that it was a final judgment, in the sense in which that term is used in the 25th section of the judicial act. If it were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than Congress could have intended.

"Judgments in actions of ejectment, and decrees in chancery dismissing a bill without prejudice, however deeply they might affect rights protected by the Constitution, laws, or treaties of the United States, would not be subject to the revision of this court. A prohibition might issue, restraining a collector from collecting duties, and this court would not revise and correct the judgment. *The word 'final' must be understood in the section under consideration, as applying to all judgments and decrees which determine the particular cause.*"

Wheeling and Belmont Bridge Company v. *Wheeling Bridge Company* was a petition to condemn land, and it had been held by the Supreme Court of West Virginia that the right to condemn was to be determined before the amount of compensation to be made had been ascertained. The judgment of the inferior court sustained the proceedings to condemn and appointed commissioners, and the State Supreme Court entertained an appeal from that judgment and affirmed it.

A writ of error from this court was brought and a motion to dismiss it denied. Mr. Justice Field said:

"The judgment appears to have been considered by that court as so far final as to justify an appeal from it; and if the Supreme Court of a State holds a judgment of an inferior court of the State to be final, we can hardly consider it in any other light, in exercising our appellate jurisdiction."

In *Luxton* v. *Bridge Company*, which was a proceeding to condemn in a Circuit Court of the United States, we held that an order appointing commissioners to assess damages was not a final judgment. The case of the *Wheeling and Belmont Bridge Company* was cited and distinguished by Mr. Justice Gray, who said:

"Jurisdiction of a writ of error to the Supreme Court of Appeals of West Virginia, affirming an order appointing commissioners under a somewhat similar statute, was there entertained by this court, solely because that order had been held by the highest court of the State to be an adjudication of the right to condemn the land, and to be a final judgment, on which a writ of error would lie, and could, therefore, hardly be considered in any other light by this court in the exercise of its jurisdiction to review the decisions of the highest court of the State upon a Federal question. 138 U. S. 287, 290. To have held otherwise might have wholly defeated the appellate jurisdiction of this court under the Constitution and laws of the United States; for if the highest court of the State held the order appointing commissioners to be final and conclusive unless appealed from, and the validity of the condemnation not to be open on a subsequent appeal from the award of damages, it is difficult to see how this court could have reached the question of the validity of the condemnation, except by writ of error to the order appointing commissioners."

It is true that it appeared in these cases that the interests of plaintiffs in error were directly affected, and it is held that such is not the case here. But that ruling in effect involves inquiry into the merits on a question of procedure, and it seems to me inadmissible for this court to deny, in a case

like this, the competency of a party to invoke the jurisdiction of the State court, when that court has exercised it at his instance.

The Supreme Judicial Court of Massachusetts held that prohibition was the appropriate remedy to avert the injury with which petitioner alleged he was threatened, and that petitioner was entitled to make the application for the writ; and thereupon passed upon the question of the validity of the statute, and rendered a final judgment sustaining its validity. The unconstitutionality of the act was the sole ground on which the application for prohibition rested, and the determination of that Federal question determined the cause.

We have then "a suit" and a "final judgment" sustaining the validity of a State statute drawn in question for repugnancy to the Constitution.

Every element requisite to the maintenance of our jurisdiction exists, and I submit that we cannot decline to exercise it because of any supposed error on the part of the State court in respect of entertaining the suit.

To repeat: The State court ruled that the petition was sufficient to raise the Federal question; that petitioner was competent to raise it; and that he was entitled to preventive relief if his contention was well founded. And these rulings should be accepted on the preliminary inquiry into our jurisdiction.

The objections of plaintiff in error to the proceedings of the land court were not for want of jurisdiction over him personally, but for want of jurisdiction over the subject matter. In other words, that there was a total want of power on the part of the persons assuming to act as a court to proceed at all. Whether that was so or not is the question which the State court decided, and discussion of that question is discussion on the merits.

Plaintiff in error alleged that the integrity of his boundary line was threatened by these proceedings. The fact that he had actual knowledge of them did not validate them if the act was void. And the answer to the question whether if he were deprived of some part of his real estate, or of the cost of litigation, such deprivation would be deprivation without due process of law, determines the constitutionality of the statute, by which that result was effected.

In my opinion the writ of error was providently issued, and I am authorized to state that Mr. Justice HARLAN, Mr. Justice BREWER and Mr. Justice SHIRAS concur in that conclusion.

True copy.

Test:

Clerk Supreme Court, U. S.